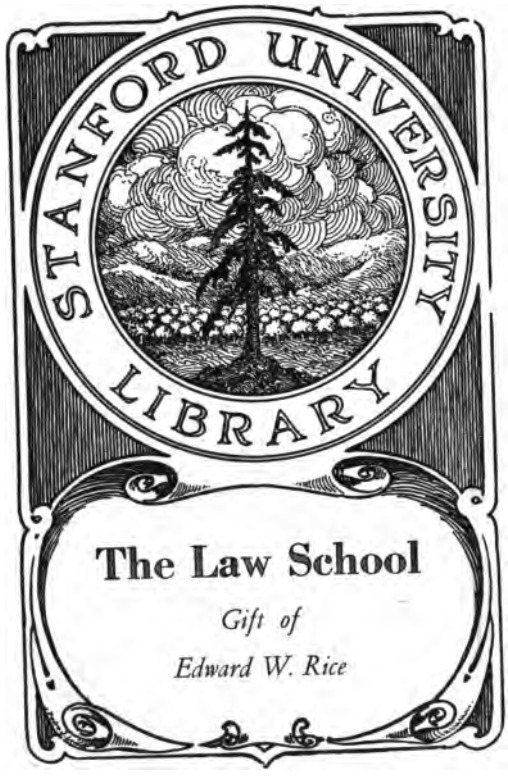
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A

SUPPLEMENT

TO

A TREATISE

ON THE

LAW OF PERPETUITY;

COMPRISING

ALL THE AUTHORITIES BEARING UPON THE SUBJECT OF THE ORIGINAL WORK SINCE ITS PUBLICATION.

BY

WILLIAM DAVID LEWIS,

OF LINCOLN'S INN AND GRAY'S INN, BARRISTER-AT-LAW,

AND LECTURER ON THE LAW OF REAL PROPERTY, &c. IN GRAY'S INN.

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PREFACE.

THE number of authorities added to our learning upon the subject of Perpetuities during the last six years, and the important character of some of those decisions, appeared to the Writer some few months since, to render desirable an attempt to present them to the Profession, in a connected form, corresponding, as nearly as might be, to the arrangement of the WORK on PERPETUITIES, published in 1843.

If there be one branch of our law, which, more than others, rests upon principles and doctrines, as distinguished from arbitrary or positive technicalities, it is the law of Perpetuities; and the interest with which the Writer regarded his efforts of six years ago, induced him to renew the inquiry into those portions of the general subject that were immediately affected by the intervening adjudications, in order that his Treatise might, by their aid, become of greater practical service to the Profession. It has not been his good fortune in every case to discover the grounds, upon which particular conclusions have been considered agreeable to the theory or the established authorities which antecedently prevailed; but, whenever this has happened, the Writer sincerely hopes that, while entering into the inquiry with that freedom which, he

is sure, learned Judges would themselves concede and desire, he may not have indicated anything approaching an insubmissive or disputatious tone of criticism.

The importance of several of the topics here introduced to the reader's notice, will be admitted by every real property lawyer; and, in truth, the inquiries upon which it has been necessary in this Work to enter, concern the very essentials of our system of settlements of land.

It is an especial gratification to the Writer to reflect, that his first labors in the Profession were given to a subject which, with many others, serves to distinguish, peculiarly, the Common Law of England as a science of principles. Lord Mansfield (some seventy-five years ago) (*a*) asserted this to be the predominating characteristic of our law, and those best acquainted with its internal system and structure, will confirm the remark.

But the subject of Perpetuities is no less remarkable and interesting, as shewing how truly and accurately the leading principles of the Law of England, have fulfilled for it the great mission of every system of positive law, by enforcing the suggestions and theories of those philosophies which determine in the abstract what is expedient and politic for societies, no less than what is right and necessary for individuals. The Writer recently endeavoured, in another capacity (*b*), to vindicate the position and the claims of

(*a*) In the case of *Jones* v. *Randall*, 1 Cowp. 39.

(*b*) In an "Inaugural Address upon the Study of the English Laws of Real Property, delivered in the Hall of Gray's Inn."

the English Law in this respect, with reference to its provisions upon those three important points (so intimately connected with the present subject)—primogeniture, entails and alienation. And he derived peculiar pleasure from finding, within the short space of a month afterwards, that what had been so faintly and inefficiently enunciated by him in the Lecture (as well as in the Introductory Chapter of the former Work), was precisely the result arrived at by another of far more consideration, who had been pursuing the very same investigation, and who has gratified every scientific lawyer by the publication of "a Treatise on the Succession to Property vacant by Death, including inquiries into the influence of primogeniture, entails, compulsory partition, foundations, &c., over public interests." Without any undue bias in their favor, Mr. J. R. M'Culloch has in that work shewn, that "the laws and customs which regulate the succession to property in England, are in most respects well fitted to reconcile conflicting interests and to promote the well-being of the community; and that but little change is required to render them as nearly perfect as the nature of such institutions will admit."

Another important Book has been just now published (even while the last sheet of the present Work is going through the press), which shews with what ardour and vigor a gentleman, who has spent a life of professional toil as a property lawyer, and with the distinguished success of twice becoming Lord Chancellor of Ireland, can recur, amid the *otium cum dignitate* of honorable retirement, to the scientific discussions and inquiries peculiar to his former avoca-

tions. Sir Edward Sugden has given to the Profession "a Treatise on the Law of Property, as administered by the House of Lords," the value of which will be appreciated by all who have considered, with the attention due to them, the five years' judgments in "*Drury* and *Warren*," and "*Jones* and *Latouche*." The Writer's purpose, in now referring to this Work, is, to express the satisfaction which, upon turning over the leaves of his new acquisition, he derived from observing (what he trusts he may not be wrong in interpreting as) an implied disclaimer by the late Lord Chancellor of Ireland, of the doctrine concerning remoteness in limitations of remainders, which was generally supposed to have appeared in the judgment upon *Cole* v. *Sewell*. As the very learned Author does not enter into the objections made to that doctrine, but simply explains the judgment to have been pronounced upon other grounds, it may be apprehended that Sir Edward Sugden's dissent has been advisedly withheld from the argument of the Writer and others, who ventured to take objection to the doctrine referred to. As, however, the question is of great importance, the Writer does not regret the space given to its discussion in the present Work.

The Writer desires to take this opportunity of expressing his gratitude for the kind and indulgent reception extended to his former effort by many in the Profession; but he has always considered it referrible rather to the good fortune of having found a subject for a Law Treatise, which was at once important and new, than to any peculiar merit in the work that first treated of it. Looking back now upon the events

of the six years which have since intervened, the Writer recollects that a debt to his Profession, not inconsiderable, has accumulated; and to a desire of discharging this debt (in obedience to Lord Bacon's injunction), may be referred the present Supplement to a Work, which itself was written before the Writer could flatter himself that any debt had been contracted.

It may be added, that having regard to the arrangement of the Work and the Table of Contents, it has been deemed superfluous to insert an "Index."

LINCOLN'S INN,
Hilary Term, 1849.

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TABLE OF CASES CITED.

SUPPLEMENT TO THE FIRST SIX CHAPTERS ON SUBJECTS IN THE ENGLISH LAW OF ALIENATION AND ENTAIL.

DURING the last five years the principles of the law of England so decidedly favourable to freedom in the alienation of land, have been consistently and largely applied in practical legislation. The law has not contented itself with a philosophic preference of the theory of free commerce in land, but has diligently acted out the spirit of those vigorous examples of past times, of which the unfettering of entails by fine and recovery (in contradiction of the baronial policy of our first Edward's era) was chief and foremost. Our long line of statutes against mortmain, again, have not been suffered to bear their witness to a policy which successive ages have acknowledged to be just and necessary, without allowing ramifications of it in other departments of the law which, though possibly less conspicuous and important than mortmain and entails, may yet contain, according to their measure, a capacity of producing the same evils which mortmain and entail would have involved, but for the judicial correction applied to the one, and the legislative limitation assigned to the other.

Thus, simplicity in the transfer of land has been promoted by a well considered and scientifically constructed enactment that all corporeal tenements and hereditaments shall, as regards

the conveyance thereof, be deemed to lie in grant (*a*); but this provision is permissive and optional only, for the land is to be considered as lying in grant *as well as in livery*, which leaves still open to the discretion of a purchaser the adoption of the ancient feoffment (*b*). Transactions and forms of assurance to which an inconvenient and burthensome condition in law was impliedly annexed, such as exchanges and partitions, are now relieved of the incidental condition (*c*). An immediate estate and the benefit of a condition or covenant may be conferred by an indenture upon a person who is not named a party to it (*d*). Contingent and executory interests and possibilities coupled with an interest in land, may now be aliened by deed, no less than by will (*e*). The reversion expectant on a lease may be surrendered or merged at discretion, without the disagreeable result of an extinguishment of the incidents to the reversion, in exoneration of the lessees (*f*). The "difficulty, delay, and expense" attending the assignment of satisfied terms, which "operated in many cases to the prejudice of the persons justly entitled to the lands," have been recovered by rendering the assignment of such terms unnecessary (*g*). The "extended investment of capital in the permanent improvement of the soil," has been encouraged, by enabling proprietors under disability to make permanent improvements in the lands, charging the expense of effecting them on the inheritance of the land; thus rendering alienable *pro tanto* lands placed in settlement (*h*). Purchasers and others "whose titles were intended to be secured" by fines levied and recoveries suffered in the lately abolished Courts of Great Sessions in Wales and Cheshire, have been protected from the "danger of having those titles impeached"

(*a*) 8 & 9 Vict. c. 106, s. 2.
(*b*) Ib.
(*c*) Ib. s. 4.
(*d*) Ib. s. 5.
(*e*) Ib. s. 6.
(*f*) Ib. s. 9.
(*g*) 8 & 9 Vict. c. 112.
(*h*) 8 & 9 Vict. c. 56; 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 10 & 11 Vict. c. 38; 10 & 11 Vict. c. 113.

by reason of the "irregularity and carelessness" with which the records of such fines and recoveries were in many cases "engrossed and kept" (*i*). The rights and capacities in respect to the acquisition of land, which are enjoyed by natural-born subjects of the kingdom, have been rendered accessible to aliens, without the tedious and expensive process of an act of naturalization (*j*). The duties upon the purchase-money arising or payable by virtue of any sale by auction have been abolished (*k*). Important facilities have been provided for "the inclosure and improvement of common and other lands subject to rights of property, occupation, or enjoyment which obstruct cultivation and the productive employment of labour," and for partitions and exchanges of lands, and for "divisions of lands intermixed or divided into inconvenient parcels," when beneficial to the respective owners (*l*). The powers of leasing, managing, and improving the possessions and land revenues of the Crown have been considerably extended (*m*).

The transfer of real property in Scotland has been facilitated, by "simplifying the form and diminishing the expense of obtaining infeftment in heritable property" there (*n*); and by facilitating the "constitution," and "transmission and extinction of heritable securities for debt" in that country (*o*); and by facilitating "the transference of lands and other heritages" in Scotland, not held in burgage tenure (*p*); and again, by facilitating the transference of lands and other heritages there, held by the tenure of burgage (*q*). And, more important still than these enactments, is the amendment of the law of Entail

(*i*) 5 & 6 Vict. c. 32.

(*j*) 7 & 8 Vict. c. 66. See also 10 & 11 Vict. c. 83.

(*k*) 8 & 9 Vict. c. 15.

(*l*) 8 & 9 Vict. c. 118. This act is one of the most creditable and useful in the modern statute-book. See also 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111, and 11 & 12 Vict. c. 99.

(*m*) 8 & 9 Vict. c. 99. This act is worthy of especial notice, as containing, with regard to the crown lands, a reversal of the objectionable and injurious doctrine of *Dumpor's case*, 4 Co. 119.

(*n*) 8 & 9 Vict. c. 35.

(*o*) 8 & 9 Vict. c. 31; 10 & 11 Vict. c. 50.

(*p*) 10 & 11 Vict. c. 48.

(*q*) 10 & 11 Vict. c. 49.

in Scotland, which law was "attended with serious evils, both to the heirs of entail, and to the community at large" (*r*).

Great facilities, again, have been given for the permanent improvement of landed property in Ireland (*s*), authorizing the advance of trust monies for that purpose (*t*), and for the sale of estates situate in that part of the kingdom which are charged with incumbrances (*u*), (an Act of the greatest possible interest and importance). Besides these provisions, further facilities have been afforded for the transfer of landed property in Ireland, by diminishing the expense of registry searches, and by freeing the land from liability in respect of bonds and recognizances to the Crown, passed or entered into at remote periods (*v*).

Thus nobly and efficiently has our modern Legislature exerted itself to secure to the community the full benefit of that enlarged and wholesome principle of public policy, which centuries ago led the Judges of England to abolish perpetuity in entails, and its Legislature to restrict alienation in mortmain. Wise and salutary legislation such as this, reflects enduring credit upon our age and country, no less than upon the lawgivers, who have so accurately appreciated the exigencies and interest of that age and country.

Concurrently with the legislative measures which have thus promoted freedom of commerce in land, important principles of law have been laid down in our Courts—or, if not laid down for the first time, have been applied there with fresh vigour—which tend forcibly to support the same wholesome policy.

Thus, the principle has been distinctly enunciated that a limitation by way of remainder, shall be so construed as to vest in interest at the earliest possible moment, at which it is capable of vesting. Thus, in the case of *Wrightson* v. *Macaulay* (*w*), the question was, whether the ultimate limita-

(*r*) 11 & 12 Vict. c. 36.
(*s*) 10 & 11 Vict. c. 32.
(*t*) 10 & 11 Vict. c. 46.
(*u*) 11 & 12 Vict. c. 48.
(*v*) 11 & 12 Vict. c. 120.
(*w*) 14 M. & W. 214; 4 Hare, 487.

tion in a will of J. H. to the right heirs of the testator, being of the name of H., which followed various limitations to the testator's son, R. H., and his issue and others for life and in tail, vested at the testator's death, in his son, R. H., or whether it vested at the time of the failure of the last subsisting of the estates limited in priority to the ultimate limitation. The Court of Exchequer adopted the principle that the party to take should be determined, if possible, at the death of the testator, and that the estate should then vest in interest, unless there be clear evidence of an intention to the contrary. And the Court, being of opinion that there was no such evidence of intention in the particular case, held that the estate descended, at the death of the testator, to his son R. H. The same principle was recognized in the important case of *Doe d. Winter* v. *Perratt* (*x*).

Another most important rule recently applied with precision and force is, that a remainder, if it once vest in interest, cannot open or become divested, so as to admit another person to take in preference to or in substitution for the person in whom it has once vested. This will be found in the same case of *Doe d. Winter* v. *Perratt* (*y*).

(*x*) 3 M. & Scott, 586; 7 Scott, N. S. 1; 9 Cl. & Fin.
(*y*) 3 M. & Sc. 586.

SUPPLEMENT TO THE CHAPTER ON THE NATURE AND ORIGIN OF EXECUTORY DEVISES AND BEQUESTS.

In the year 1844, it seemed likely that the ranks of executory devise would receive a considerable accession, in respect both of number and importance. No longer was the real property lawyer to be permitted to hold communion with his ancient friends, the contingent remainders; for the proposition was, that these long-accustomed forms of limitation should be forcibly ejected from the scheme of every English settlement, and their more youthful and more pliable allies, executory devises and executory uses, were by compulsion to occupy their place. Let no one say, that because there has been a Fearne to dignify immortally the very name of contingent remainders, it can therefore be nothing but a fiction to narrate that, after the termination of a given year, no estate in land was to be created by way of contingent remainder. For so, in truth, it was: the land of Coke, and of Fearne, and of Butler, resolved to acknowledge no longer either value or vitality in that idea, that name, and that system, to which had been devoted some of their best and choicest lucubrations. It was henceforth to be even a hateful and a hated thing; the very mention of it disreputable; acquaintance with it impossible because illegal. No longer were to be permitted such problems for the restless logic, or such *nuces juridicæ* for the amusement of our profession, as—whether a given limitation is a vested or a contingent remainder—a remainder with a double aspect—a remainder vested with a liability to open and let in —a contrariant remainder, &c. &c. No; the statute 7 & 8 Vict. c. 76, sought to "accompany" these "dead," as Lord Coke accompanied "perpetuities," when *Portington's* case was decided, "to the grave of oblivion." "After the time at which this act shall

come into operation, no estate in land shall be created by way of contingent remainder." This was to be the funeral knell of an existence which had preceded the statute *De donis*, had known uses in their earliest infancy, and had witnessed alike the birth and the death of common recoveries. Never did brief clause attempt more; never anything more solemn in its manner or its tone; more painful in its execution to beholders; more ungrateful in action towards its subject (*a*).

But, to advert to the reality of the enactment:—After declaring (in the terms above quoted) contingent remainders to be nonentities in the law, it proceeded to supply the vacancy thus occasioned—"Every estate which, before the time at which this act shall come into operation, would have taken effect as a contingent remainder, shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties as an executory devise."

Thus, it will be seen, vested remainders were to continue, but contingent remainders were to become executory limitations. It would have followed from this enactment, supposing its operation not to have been obstructed by any insuperable difficulty, that all the learning proper to ordinary executory estates created by use and devise, would have become applicable to these statutable executory estates. There would have been but one doctrine governing all limitations of realty dependent on contingencies,—the doctrine of executory limitations (stated at large in the Chapter to which the present is supplemental).

But, suffice it to say, difficulties not clearly shewn to be otherwise than insurmountable, at once suggested doubts of the efficacy, and suspicions of the utility, of this most important enactment. Evils of a positive character were considered by

(*a*) Even the most practised and busy law reformer must surely find himself startled when, alighting casually upon p. 167 of Vol. 17 of the Statutes of the United Kingdom, his eye falls on the pithy unsentimental margin — "contingent remainders abolished."

some to be proximate results of the statute. Hence arose a very prevalent fear that irreparable harm might ensue to some important parts of our real property system, if the repeal (even retrospectively) of this enactment were long deferred. And this feeling forthwith embodied itself in an act of Parliament which, within one year of the passing of the objectionable statute, effected a repeal of it. This repealing statute is the 8 & 9 Vict. c. 106, "An Act to amend the law of Real Property;" and so desirable was it deemed to restore the old law by relation back to the very day when the earlier enactment took effect, that, although it had then enjoyed seven months' operation, the 8 & 9 Vict. repealed it, "as from the time of the commencement and taking effect thereof."

Thus were contingent remainders re-instated in the Charts of English Settlements; and, so restored, not only is their reputation unsullied, but more worthy, from the very fact of its involuntary dishonour.

It does not appear that any examination is required of the consequences that might have been expected to flow from the statute 7 & 8 Vict. c. 76, s. 8. The later statute has so entirely reversed its provisions, that such an inquiry, though interesting, probably, as matter of speculation, would certainly not lead to any useful or practical end.

It belongs to the subject of the present chapter to take notice that the doctrine stated in the former book as to the means used by the Court of Chancery, to protect the rights of persons interested under executory gifts of personal chattels (*b*), has been applied in the late case *Conduit* v. *Slwane* (*c*).

(*b*) Treat. Perp. 96 (*c*) 1 Coll. 25.

SUPPLEMENT TO THE CHAPTER ON THE NECESSITY FOR A RULE FIXING LIMITS TO THE REMOTENESS OF LIMITATIONS OF FUTURE USES, AND EXECUTORY DEVISES AND BEQUESTS, AND TRUSTS OF THE LIKE NATURE.

THE object of the inquiry, which formed the subject of this chapter, was to trace out the circumstances which first manifested the necessity for a rule, restraining within reasonable limits the remoteness of executory limitations, and were consequently the cause of its introduction. This investigation established that the doctrine of the indestructibility or indefeasibleness of *executory limitations*, was the immediate producing cause of the Rule against Perpetuities. The prominence which now belongs to the discussion of the 16th Chapter(*c*) renders it desirable to take this occasion of observing that there is nothing in this conclusion at all incompatible with the doctrine maintained in that chapter, that *contingent remainders* are within the Rule against Perpetuities. Undoubtedly, it was the frequent use of *executory limitations* which *first* exhibited the absolute necessity of providing some restriction to confine future estates within reasonable bounds, but the occasion which soonest exemplified the evil did not contain the whole or point out the utmost limits of it. The extent of the danger was one thing; the form in which it was first prominently exhibited was another and a different thing. The question, therefore, would still be, whether remainders, in their own nature, possess a guarantee against undue remoteness, and it would be nothing to the purpose to shew that the circumstances which immediately preceded the introduction of a rule against remoteness, did not otherwise than indirectly point to contingent remainders. But it will be expedient to pursue this observation in the supplemental chapter where,

(*c*) Treat. Perp.

in reference to contingent remainders, it becomes of more direct and practical application.

It will be necessary to notice in this place some important statutory amendments of our law of settlement, which have been effected during the last five years.

The first is that which has imparted to contingent remainders, somewhat of the character of indestructibility, which, as the inquiry of this Chapter shewed, so peculiarly distinguished, under the old law, executory devises and springing and shifting uses.

It being a doctrine of the common law, that every contingent remainder must vest at the determination of the estate on which it depends—of that estate which keeps the seisin full,—it followed that the contingent remainder failed altogether, if either the previous estate expired in its natural course before the contingency had happened on which the remainder was to vest, or if the owner of the previous estate did any act which produced, before its natural expiration, a cesser or extinguishment of it, while the happening of the contingency was yet future. By an act which in law amounted to a *forfeiture*, or by *surrender* to the owner of the first vested estate in fee in remainder, or by *merger* arising from the accidental union of the particular estate and a subsequent vested remainder, this consequence of the premature determination of the particular estate ensued, and, with it, likewise, the failure of the remainder (unless, from being contingent, it had become vested before that event). This rule of our law has now been altered, first, by the 7 & 8 Vict. c. 76, s. 8, and then by the 8 & 9 Vict. c. 106, s. 8. The former act declared that contingent remainders existing under deeds, wills, or instruments executed or made before the time when that act should come into operation (31st December, 1844), should not fail or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine. The act had previously (as we have seen), provided that all

contingent remainders created after the 31st December, 1844, should be deemed executory devises: and thus, by the mixed aid of these separate provisions, it was designed to protect contingent remainder-men from the consequences of a forfeiture, surrender, or merger of the particular estate. This enactment being deemed objectionable, so far as it purported to preclude altogether the *limitation* of contingent remainders, was repealed, in the *whole*, from the time of the commencement or taking effect of it, and an enactment, restricted to the simple point of the *destructibility* of contingent remainders, was substituted, which is made to take effect from the time of the original commencement and subsequent retrospective repeal of the 7 & 8 Vict. c. 76, viz.:—the 31st December, 1844. This provision is contained in the 8th section of the 8 & 9 Vict. c. 106, which enacts, that a contingent remainder existing at any time after the 31st day of December, 1844, shall be, and, if created before the passing of the act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened. Some strictures have been passed (*a*) upon this enactment, which may deserve consideration; but, so far as it is material to speak of it in connexion with the subject of the present work, it may be admitted that the clause effects, without any considerable doubt, its main object of changing the common-law rule respecting the time of vesting of contingent remainders. That rule *was*, that the remainder must vest when the particular-estate determines. The rule *now* is, that the remainder must vest when the particular-estate naturally, or, according to the terms of its limitation, expires.

The other of the statutory alterations above referred to, concerns the *alienability* of contingent and executory estates,—a topic of much interest in its relation to the rules for prevention

(*a*) Supplement (1845) to Sweet's Concise Precedents, pp. 5 & 6.

of remoteness in such estates, and which suggests considerations of a most practical character, tending either to narrow, or not to narrow, the range of our actually existing Rule against Perpetuities.

Statutes have recently been passed, to enable persons entitled to contingent and executory interests in land, or interested under contingent or executory limitations of land, to *alienate* and dispose of those interests, so as to make the disposition valid and effectual at law, which, by the rules of the common law, could not be. And it becomes important to consider whether this alteration of the law at all affects the stringency, or contracts the scope of the rule against Perpetuities, the provisions of which are designed to promote and to secure freedom of *alienation*.

By the 7 & 8 Vict. c. 76, s. 5, any person may convey, assign, or charge, by any deed, any such contingent or executory interest, right of entry, or other future estate or interest as he shall be entitled to, or presumptively entitled to, in any freehold, or copyhold, or leasehold land, or personal property, or any part of such interest, right, or estate respectively; and every person to whom any such interest, right, or estate shall be conveyed or assigned, his heirs, executors, administrators, or assigns, according to the nature of the interest, right, or estate, shall be entitled to stand in the place of the person by whom the same shall be conveyed or assigned, his heirs, executors, administrators, or assigns, and to have the same interest, right, or estate, or such part thereof as shall be conveyed or assigned to him, and the same actions, suits and remedies for the same, as the person originally entitled thereto, his heirs, executors, or administrators would have been entitled to, if no conveyance, assignment, or other disposition thereof had been made. To this was added a proviso that the power should not extend to authorize the disposition of the expectancies of an heir, or heir of the body inheritable, or next of kin, nor of interests to be acquired under subsequent deeds or wills.

This enactment continued in operation from the 1st January

to the 1st October, 1845, but, according to the better opinion, it did not extend to authorize the alienation of contingent interests, &c., which were *created* before the year 1845, there being a proviso that the statute should not extend to any act, deed, or thing executed or done, or (with one exception not material upon the present subject) to any estate, right, or interest created, before the 1st January, 1845. The 8 & 9 Vict. c. 106, which repealed the earlier provision from the 1st October, 1845, enacted that, after that day, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, might be disposed of by deed. To this was added a proviso that no disposition should, by force only of that act, defeat or enlarge estates tail, and that a disposition by a married woman should be made conformably to the provisions of the Fines and Recoveries Abolition Act.

We find, then, that the law now recognizes a general unlimited power of alienation, by instrument *inter vivos*, over future interests in land of all sorts, not being mere expectancies or hopes of succession dependent on an unaccrued title or character.

What is the condition of the power of *testamentary* alienation in this respect? This is determined by the 7 Wm. 4 & 1 Vict. c. 26, s. 3, which provides that the power of disposing by will conferred by that statute, shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken and other

rights of entry. This power of disposing by will may be considered substantially co-extensive with the power of alienating by deed, given by the subsequent statutes, to which reference has already been made, although the 1 Vict. omits to mention "possibilities coupled with an interest," which the 8 & 9 Vict. distinctly specifies.

The design and effect of these enactments are so far free from doubt that they render alienable those various interests in real estate which were inalienable under the rules of the common law. Until (*b*) the statutes of the present reign, a future interest in land was incapable of transfer by *deed* or common assurance, unless vested or fixed in the individual making the assurance; although, by the doctrine of estoppel, that object might be effected circuitously. Consequently, the interests conferred or reserved by a contingent remainder, an executory devise, a springing or shifting use, or a condition of re-entry or other condition, could not, so long as the vesting of the interest remained doubtful or in suspense, be passed from one person to another in such a manner as that, upon the vesting of the interest, the transferee should have, in the eye of the law, the same legal title and property which, without the transfer, would belong to the party named in the limitation. In equity, this dealing might take place, when supported by a valuable consideration and (with qualifications) even voluntarily; and, as the result of such a dealing (which was regarded in the light of a contract) the person interested by virtue of it would be enabled to enforce a completion or perfection of the title by the transferor, whenever his situation put it in his power to make a valid legal assurance.

The power of *testamentary* disposition over these interests was not so restricted. They were devisable when (although the contingency might not have happened) the testator was ascertained as the person, or one of the persons in whom the interest would, upon the happening of the contingency (if it should happen), become vested, and to whose heirs, conse-

(*b*) Treat. Perp. 120.

quently, the interest would be transmissible in the meantime. If, on the other hand, the person to take was not, in any degree, ascertainable before the contingency happened, there could be no devise of the future interest. These rights, although of the class of possibilities coupled with an interest, could not be passed by will, even when the testator subsequently proved or was shewn to be the person described by the terms of the original gift.

This, then, speaking generally and without entering into subordinate distinctions, was the state of our law concerning the alienation of future unvested interests in land, when occasion first arose, for a rule in prevention of Perpetuities, and the rule itself was in process of construction. It is obvious to remark that the limitations, the creation of which it has been and is the object of the rule against Perpetuities to confine within definite limits, are the very same class of interests which, when created, were for the most part (as above sketched) inalienable by the rules of the common law. Every limitation to which the rule against Perpetuities is capable of applying, must be either a contingent or an executory interest, or a possibility coupled with an interest, or a right of entry; and these are the interests and rights which at law were, in general, not transferrable, but are now made so.

The coincidence is interesting and worthy of observation, even though we should not be able to conclude that the rule against Perpetuities was a direct *emanation* of the old doctrine of the inalienability of contingent interests.

This point concerning the origin of the rule is one which the extensive and fundamental change effected (as above shewn) in one branch of our law of alienation by the statutes 7 & 8 Vict. and 8 & 9 Vict. renders it desirable, if not indispensable, clearly and accurately to determine. If all contingent and executory interests in land are now become alienable both by deed and will, whereas formerly they were (as a general rule) not alienable at all, it is (to say the least) a pertinent question, whether the rule against Perpetuities—a rule which was pro-

vided specially for the regulation and control of contingent and executory interests, and which applies to nothing else—proceeded or was grounded upon a consideration of their inalienability, or any imperfection proximate to that. It may or may not be a notion which we receive with respect, or to which we attach consequence, but, to account for the introduction of a notice of it here, the remark may be made, that such an impression has in some quarters existed.

The question touches upon nothing less than the true meaning and occasion of the rule against remoteness. By that rule the law says in substance,—No estate or interest shall be so limited as not to vest, or not certainly (if at all) to vest, within the compass of a reasonable period, which reasonable period the rule then proceeds to determine and mark out. The object of this rule is, to protect the inheritance from being disturbed and ripped open by contingent gifts of remote possibility. The law desires that each settlement should become absolute and final in its dispositions of the settled subject within the reasonable period which it defines. Whatever remains uncertain and in contingency affecting the ownership, clogs the alienation and free disposition of it. The policy of the law is satisfied if estates and interests become vested or fixed within the specified limits, because then a period is put to all uncertainty as to where the ownership resides; there is then a point at which all parties interested under the settlement may ascertain and finally determine their position, without the chance of subsequent intrusion or alteration. The policy of the rule is not satisfied merely by a conjunction of limitations which admits of the possibility of an early or even an immediate alienation of the whole estate by the concurrence of the several persons interested under them, although it is true that, in requiring an early vesting of limitations, the law has regard to the fact that, as the result of that vesting, the beneficiaries will be enabled, by concurring in an assurance, to dispose of the whole interest, and so set free the inheritance. If a limitation were inde-

finitely or remotely contingent or executory, it would not be a circumstance to exempt it from the reason of the doctrine, that it was a limitation to a living person, in a manner or by a form which would enable him forthwith (having regard to the altered state of the law) to alienate such contingent or executory interest, or, by joining in an assurance with the owner of the prior estate, to discharge the property from such contingent or executory interest.

The objection would still exist, that the settlement was clogged with provisions for indefinite occurrences, and that the primary objects of the settlement were compelled to arrange with those who had contingencies only and no certain interest, in order to effect a complete disposition of the settled land. It is not capacity to alienate each separate executory interest which satisfies the doctrine, but capacity of alienation of the entire thing resulting from a final vesting of determinate and unfluctuating estates in that thing. The law proposes to itself as a distinct and simple object, that no land shall, by deed or will, be subjected to a complication of ownership, which can cause a new right to arise under it after the lapse of a reasonable period. It contemplates also that, as a general result of carrying out this its primary and definite purpose, the alienation of the land will, at the expiration of the reasonable period in question, be attainable by the joint act or consent of those who have then acquired independent and determinate interests as the certain objects of the settlement.

It may be said that, whenever the contingent or executory limitation is made to an actual living person, he has it in his power (since his interest under that limitation is now alienable), at any time after the execution of the settlement to enable the other persons interested to convey the property away, and that, consequently, such a case does not at all, in substance, differ from the case of a vested remainder postponed to a long term of years, or to some other estate which may not determine until a remote period, where, although actual enjoyment

under the remainder is very distant, and although without including it no absolute disposition of the property can be effected, yet the person entitled to the remainder has it in his power to disencumber the inheritance. But the answer is amply sufficient to this suggestion, that it disregards the essential distinction between interests which are uncertain and may never take effect, and those which enter into and form an integral portion of the single existing ownership. This is precisely the distinction which the law enforces: it objects to indefinite contingencies being imported into the scheme of the settlement, to fetter and intercept an enjoyment, which would otherwise be free and unqualified; and it cannot, therefore, be an answer to say that, by arrangement and contract, such an indefinite contingent or executory gift may be got rid of, or made to assist in the free alienation of the land. Moreover, the important fact is lost sight of in arguments of this kind, that the remoteness which affects the prospect of actual enjoyment in the case of the vested remainder, is remoteness coincident merely with the duration of some actually subsisting estate recognized by the law, whereas the remoteness of an executory gift or contingent remainder (even though limited to a person who may immediately alienate it), is a capricious remoteness not representing the termination of one subsisting estate, and the commencement in possession of another, but suspended arbitrarily as a contingency to preclude finality in the working of the settlement. When it is remoteness merely in the prospect of *enjoyment* resulting simply from the fact of the *previous* limitation of an actual effective interest which the law recognises, and corresponding to the natural limits and duration of that interest, it would be out of all reason to expect the law to declare such remoteness in any way objectionable. If, by the rules of law, a term of five hundred years is an estate the creation of which is just as valid as the limitation of an estate for life, or an estate in fee, it follows, as a necessary consequence, that a gift to take effect in possession on the determi-

nation of the term, is likewise valid. The law allows a long term to be carved, as a separate self-existent interest, out of the absolute ownership, and thenceforth to continue as an independent estate, and it would be a clear contradiction to hold that a valid interest could not subsist expectant on that estate. It is in no wise, however, a consequence of this state of things (but something essentially different), to admit of the limitation of remote interests (whether forthwith alienable or otherwise), in forms which do not spring out of, or take their origin in, the necessary legal relation of one estate which is subsisting, to other interests which are likewise subsisting (although future, because subject and postponed to the former).

One other observation remains: — The test ordinarily allowed for determining the presence or absence of the danger of perpetuities in respect of future limitations, is not their capacity of being *alienated*, but of being *destroyed*. Extinction and not co-operation is what the law requires to be attainable, in respect of remote future estates, before it acknowledges their remoteness to be harmless. It is to *reverse* the policy of the law, to rely on the vitality, for the purposes of transfer, of a remote expectancy, as a condition which ought to ensure its validity.

If a case be supposed of an estate limited to arise and take effect upon a remote event or contingency, in such a way that it would be uncertain until the actual happening of that event or contingency, whether the gift would ever take effect at all, such a limitation, by our law, would be void, and yet it would fall within the provisions of the new enactment, rendering such possibilities alienable. Now, *not any* executory devise or shifting use, whether limited to a person *in esse* or not, vests any *estate* in the party to whom it is made, before the event on which it depends has taken place. Supposing, therefore, an executory limitation so constructed that it may possibly not take effect until after the limits of perpetuity are passed, it is, *ex necessitate*, a case where the interest under the limitation will remain unvested for all that time, and where, consequently, until such time has elapsed there will be no estate in any one

by virtue of the limitation; and, as the result of such a condition of the gift, it must upon all principle fail as being a perpetuity.

The instance has been put of a vested remainder expectant upon a long *beneficial* term of years, that is, postponed to a term not created for limited purposes merely, but which will carry along with it the beneficial use and ownership of the land; and it is said that here is practically a perpetuity, quite as much as in the case of an executory limitation to a person *in esse* and ascertained, to arise upon an indefinite event. But, how, in an argument of this kind, can anything turn upon the distinction between a beneficial and a trust-term? There is no difference between them in the estimation of a Court of law; and if law allows the validity of the expectant remainder in the one case, equity must allow it in both.

The conclusion, then, is, that the circumstance of contingent and executory interests having been rendered alienable at law as well as in equity, does not avail to render valid a contingent or executory limitation which would in other respects be too remote, even though it happen to be limited to a person *in esse* and ascertained, who might forthwith dispose of the interest.

SUPPLEMENT TO THE CHAPTER ON THE HISTORY AND PROGRESSIVE ESTABLISHMENT OF A RULE FOR PREVENTION OF REMOTENESS UNDER THE NAME OF THE RULE AGAINST PERPETUITIES.

SOME of the cases which have occurred since the year 1833 have given occasion to an examination of the older authorities by which the history of the Rule against Perpetuities is traced; and which it was the object of this chapter to place before the reader. The result has always been an adherence to the limits of remoteness as defined and adjusted in 1833, by *Cadell* v. *Palmer;* a decision which the ultimate Court of Appeal has on several recent occasions shewn itself well satisfied with (*c*).

But the case of *Taylor* v. *Biddal* (*d*), which first seemed to sanction the period of lives in being and twenty-one years for a perpetuity, has been the object of some just strictures in the case of *Lord Dungannon* v. *Smith* (*e*). In reference to *Taylor* v. *Biddal*, it was well observed that no objection was raised in that case, that the devise (*f*) to the "heirs of the body of B. as they should attain their respective ages of twenty-one," might let in a succession of minorities of children and grandchildren, so as to exceed the limits of twenty-one years after a life in being before the estate would vest; but, on the contrary, that the case was argued and decided upon the facts that had actually taken place. It was observed that *Taylor* v. *Biddal* was decided when the rule by which executory devises were to be governed was in its infancy, and that it was the first case which seemed to extend the time for the vesting of executory

(*c*) *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 546; *Broughton* v. *Broughton*, 1 House of Lords' cases, 406; *Cole* v. *Sewell*, 12 Jur. 927.

(*d*) 2 Mod. 289.

(*e*) 12 Cl. & Fin. 546.

(*f*) See Treat. Perp. 143.

devises from the termination of lives in being to the period of twenty-one years beyond. It is a clear ground of objection, however, to *Taylor* v. *Biddal*, that it would go to prove too much, viz., that a bequest simply to the first heir of the body at twenty-one, would be good. The case is, consequently, an unsound one, although probably a reason may be found for the conclusion adopted in the conjecture offered by one of the learned judges in *Lord Dungannon* v. *Smith*. Sir Nicolas Tindal remarked that the case of *Stephens* v. *Stephens* (*g*) indirectly afforded decisive proof that *Taylor* v. *Biddal* was dealt with as if the executory devise had been limited to *sons*, because *Stephens* v. *Stephens* was a case of a devise to such *son* of the body of W. S. as should attain twenty-one, and the Court of B. R., on certifying their opinion in the latter case, referred to *Taylor* v. *Biddal* as the only authority applicable to a suspension of the vesting until a *son unborn* should attain twenty-one. The result, then, as intimated in the previous work (*h*) is, that the extension of the limits of Perpetuity to twenty-one years beyond a life in being, was not thoroughly settled until the decision of the case of *Stephens* v. *Stephens*.

Two other decisions of later date than *Taylor* v. *Biddal*, viz. those of Lord Chancellor Hardwicke in *Gower* v. *Grosvenor* (*i*), and *Trafford* v. *Trafford* (*j*), have likewise been overruled (*k*), after repeated animadversions upon them in other cases.

Turning to another question, and considering whether the case of *Cadell* v. *Palmer* (*l*), which concluded the long line of authorities comprising the history of the Rule against Perpetuities, has finally and conclusively settled the utmost boundaries of legal remoteness, the writer desires to speak again of the case of *Smith* v. *Farr* (*m*), in which a contention arose that seems

(*g*) Ca. T. T. 228.
(*h*) Treat. Perp. 143, 147.
(*i*) 5 Madd. 337.
(*j*) 3 Atk. 347.
(*k*) *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 627; *Rowland* v. *Morgan*, 6 Hare; 12 Jur. 348, affirmed by Lord Cottenham, C., on appeal.
(*l*) 7 Bligh. N. S. 202.
(*m*) 3 You. & Coll. 328. See Treat. Perp. 726.

not to be excluded (in terms at least) by the decision in *Cadell* v. *Palmer*. In *Smith* v. *Farr* the gift was to the testator's children for their lives, and after their decease, to the testator's surviving grandchildren who should be then living, *until the youngest of them should attain twenty-one*, and upon the *youngest of them attaining such age*, unto and between all such his said grandchildren and *the children of any such grandchild who might be then dead* leaving issue; such children to take only the parent's share. It was contended that the gift to the children of grandchildren was void for remoteness; and the objection was directed to the consideration that, in ascertaining the operation of the gift to those great-grandchildren, a term of nine months as the ordinary period of gestation might be required to be used (in addition to the lives in being and twenty-one years recognised by the rule) under circumstances or for purposes which, according to the principle of *Cadell* v. *Palmer*, would exclude the case from those excepted instances in which a term of gestation is allowed to be taken into account. The precise ground upon which this conclusion was drawn is not to be easily collected from the report; in some parts of which the ground of objection suggested seems to refer to a different circumstance or feature in the case from what is intimated upon the same point in other places. However, it is clear that the objection was urged upon one of two arguments:—First, the gift to the great-grandchildren was possibly contended to be void on the ground that some of the great-grandchildren might be *in ventre sa mere* on the attainment by the youngest grandchild of the age of twenty-one, which would be a contingent period for gestation added on to the full term of lives in being and twenty-one years, in *obtaining which term itself* two several periods for gestation *might* have been already used, namely, one in respect of a child who might be *in ventre sa mere* at the time of the testator's decease, and the other in respect of a grandchild who might be *in ventre sa mere* at the determination of the life-estates. If this formed the ground of the

contention against the validity of the gift to the great-grandchildren, the writer conceives it unsound and wrong upon the considerations to which he adverted when speaking of this case in his previous work (*n*), and which need not be here repeated. But the other ground upon which, having regard to some passages in the report, the objection may be conjectured to have been founded, is this:—That the grandchildren upon whose attaining twenty-one the property was divisible, might have been *in ventre sa mere* at the determination of the first series of lives, and then, although the term of remoteness might be extended by the period of gestation when taken with reference to a gift to the grandchildren themselves, yet, in the case of a gift to great-grandchildren, and for ascertaining the objects of such gift, the period could *not* be included, because, taken in that form, it would (relatively to the great-grandchildren and the gift to them) be a term in gross, or a term partially so, as distinguished from a term of gestation referring *solely and simply* to the infancy of parties born or *in ventre sa mere*. This is certainly a very nice question, and one which, it must be admitted, is not fully or in terms settled by *Cadell* v. *Palmer*. Nevertheless, the principle enunciated in that case for determining when the period of remoteness may be extended by the number of months equal to the ordinary term of gestation (*o*), does seem with sufficient clearness to decide that, in such a case as the gift to the great-grandchildren in *Smith* v. *Farr*, no allowance can be made for a period of gestation referring to the ascertainment of a distinct class of persons, namely, the grandchildren. For what purpose would the term of gestation be used, supposing in such a case it could be taken? Clearly, it would be used to mark out the limits of the period during which the vested interests of the grandchildren would be liable to be divested by their death leaving issue; in other words, it would be applied to the purpose of ascertaining who were objects of the gift to the great-grand-

(*n*) Treat. Perp. 726—728. (*o*) 7 Bligh. N. S. 239.

children, and of composing a portion of the term at the expiration of which those objects were to be defined. *E. G.*, the share vested in an elder grandchild might (supposing the provision valid) be defeated by his own death leaving issue at any time within twenty-one years from the expiration of eight or nine months next after the death of the last tenant for life when a younger grandchild *in ventre sa mere* at the time of such death might come *in esse*. The property not being distributable till the youngest grandchild living at the death of the last tenant for life attains twenty-one, and the share of each grandchild being subject to a gift-over on his death leaving issue before such attainment of twenty-one by the youngest grandchild, the operation of the clause in allowing an additional term for the youngest grandchild's gestation would clearly be, to render defeasible, during that additional term, the interests (not of the infant himself,—or, at least, not of the infant solely, but those) of parties who might have been in existence long previously to the birth of the infant. Relatively, therefore, to the other grandchildren, the term of gestation for the youngest grandchild would be a term in gross; it would not be a term referring merely and simply to infancy. So, likewise, relatively to the great-grandchildren, it would (in the case of all, except those who were issue of the youngest grandchild) be a term in gross, because they would be enabled to take shares after the lapse of lives in being and twenty-one years, during an additional term of nine months, taken with reference to the infancy of a person who was in effect an entire *stranger* to the gift under which such great-grandchildren would claim. Upon the whole, it is conceived that (upon the latter of the arguments above supposed) the principle of the limits settled by *Cadell* v. *Palmer* is opposed to the validity of gifts such as that to the great-grandchildren in *Smith* v. *Farr*. It is to be regretted that that case went off upon a ground which rendered unnecessary a decision of the point; but it need hardly be added that, whatever be the view likely to be ultimately adopted, it will, for the present, be prudent,

whenever the term of the infancy of a person not *in esse* and a stranger to the particular gift, is intended to form part of the period of remoteness, to select the term of twenty, rather than twenty-one years, from the time of the birth of such person, for the absolute vesting of the gift, so that the term of such infant's gestation (should circumstances make it important) may be comprehended within the single limit of twenty-one years, which the rule allows to be taken as a term in gross. Another method of avoiding the difficulty would be, to provide that the twenty-one years should be taken from the death of the party who might leave *in ventre sa mere* the child, whose infancy was intended to form part of the term of remoteness.

SUPPLEMENT TO THE CHAPTER ON THE ADJUNCTS OF OR ACCESSORY TO THE RULE AGAINST PERPETUITIES.

In the principal work the doctrine was suggested, that in determining the validity or invalidity of testamentary dispositions under the Rule against Perpetuities, it is not permitted to advert to events taking place subsequently to the *date of the will*, although the death of the testator is the period for ascertaining the objects of his bounty. But, while so stating what he conceived to be the rule on this point, the writer remarked on its inconsistency with the other rule which computes the period of remoteness in testamentary gifts from the death of the testator, being the time when the will takes effect in law; just as the date of the deed is the period to be taken for that purpose, when the limitations are not created by will (*a*). And in another place (*b*), when speaking of the doctrine of *cy près*, it was observed that wherever, independently of the construction of *cy près*, a gift to a class of unborn issue would fail according to the state of events at the date of the will, then, notwithstanding the circumstance of some of the objects of it being born in the testator's lifetime, the rule of *cy près* must be applied to the limitations as they would have stood had the testator died immediately after making his will, and that no exception is to be made in favour of those portions of the gift which, according to the events subsequent to the will, would have been valid in their original form. And the writer concluded that the authorities so far warranted the doctrine thus stated, that a decision then very recently pronounced in *Vanderplank* v. *King* (*c*) appeared not reconcileable with them, when it applied *cy près* only to the extent that the

(*a*) Treat. Perp. 170—172. (*b*) Treat. Perp. 441.
(*c*) 3 Hare, 1.

circumstances *at the death*, as distinguished from those at the time of the *devise*, rendered it necessary to apply it. The writer conceives that this latter question is not undistinguishable from the former, and, as far as it may be considered so, it will be reserved for that part of the present work which treats of the doctrine of *cy près*.

The very able Judge who decided *Vanderplank* v. *King* has since had occasion to consider again the true terms of the Rule against Perpetuities in respect to testamentary gifts, and has distinctly propounded the doctrine that, in deciding on the validity of such gifts with reference to questions of remoteness, the circumstances as they exist at the time of the testator's death, and not at the date of the will, are those by which the point of remoteness is to be tried; that the fact of the terms of the devise contemplating contingencies which, if the testator should die immediately after making the will, would, according to the events at that time, be too remote, is not any ground of objection to that devise, if, between the execution of the will and the death of the testator, events happen which, had they taken place before the will was made, would have excluded any objection of remoteness. This doctrine must be considered to have been (if not decided, yet) laid down in terms so strong as to forbid any doubt what the decision of the learned Judge would be, should the point come judicially in question before him (*d*).

The duty of an author would sometimes be discharged best, in such a case, by his confining himself to a simple statement of the doctrine which has been deliberately applied upon a full investigation of the matter in question, with, perhaps, a few suggestions as to the bearing of the new decision, whether by way of explanation or of doubt. And, in the present instance, it may be unaffectedly said, that it would be far more agreeable to the writer, regarding it as a matter of feeling merely, to recall at once the objectionable doctrine

(*d*) *Faulkner* v. *Daniel*, 3 Hare, 344; *Williams* v. *Teale*, 6 Hare, 199; *Ferrand* v. *Wilson*, 4 Hare, 239.

(if such it be), rather than to treat the condemnation of it as, even in appearance, at all open to criticism. But, if it should happen that contemporaries appear not to be agreed upon the point (and a reference to the cases and standard text-books will clearly shew that, in this instance, they are not), the very occasion seems to arise when a detailed investigation of the matter, is especially the function of an author. It is, of course, of the utmost importance to any system of law, that the points which from time to time arise upon it, should be determined consistently with its fundamental principles, and (if, together with that, it may be) also with established authorities. But, in the present instance, the manner in which the learned Vice Chancellor was kind enough to treat the author's statement of a contrary doctrine, renders it especially incumbent upon him, as he conceives, to give deliberate attention to the whole argument. It will, therefore, be the humble endeavor of the present writer, to make such observations upon the subject alluded to, as appear fairly and properly to enter into the discussion and decision of it; and it is, perhaps, scarcely necessary to add, that it cannot be of the slightest consideration with him, in the independent examination of the point, that he may himself have suggested in his former work an observation on one side or the other, of the controversy. In the year 1846, the very important case of *Lord Dungannon* v. *Smith* (*e*) occurred, and from the opinions delivered in that case, and the arguments and judgments in the previous cases of *Mackinnon* v. *Peach* (*f*) *Vanderplank* v. *King* (*g*) *Harris* v. *Davis* (*h*) and *Andrew* v. *Andrew* (*i*), it is now clear that the point alluded to has never been finally and fully settled; and we are at liberty to investigate it amply and critically. How remarkable that when the doctrine of Perpetuities is two centuries and a half old, a point which it belongs to the very essence of it to determine, is only now demanding attention!

(*e*) 2 Cl. & Fin. 546.
(*f*) 2 Keen, 555.
(*g*) *Supra.*
(*h*) 1 Coll. 416.
(*i*) 1 Coll. 690.

It will, undoubtedly, be a desirable and gratifying conclusion to arrive at, that, in considering the validity of testamentary dispositions, regard is to be had to the circumstances which exist at the time of the testator's death, and not to those only which have happened when he makes his will. It must be the inclination of all, in applying the Rule against Perpetuities, to avoid giving, in any instance, to what is otherwise a most salutary provision, the appearance of a harsh and arbitrary restriction. The rule is good; it is beneficial; it is necessary: but, in reference to every open point, the effort should always be, to confine its operation within the bounds of wholesome necessity. What, then, are the conclusions of settled principles of law, and of such authorities as are inferior only to those principles, in weight and conclusiveness, upon the question,—Can events which happen after the making of the will, and before the death of the testator, have any effect in determining the point of the validity of his devises and bequests under the rule against Perpetuities?

To place the question in a clear light, we may suppose the following different classes of limitations to be contained in a will:—first, a gift to B. on the death of A. without issue, A. taking no estate, and filling no character, which would enable him to become tenant in tail by force of that gift; secondly, a limitation (not by way of remainder upon a vested life estate) to the first heir male of a living person who shall attain twenty-one, or any other specified age; thirdly, a limitation to A. for life, remainder to his eldest son (unborn at the date of the will) for life, remainder to the children of that son in fee; fourthly, a limitation to all the children of A. (a living person) who shall attain twenty-five or any other age beyond twenty-one; fifthly, a limitation to A. for life, and after his decease to the person who for the time being shall possess the title of Baron B., and his successors in that dignity for ever; and sixthly, a limitation to A. for life, remainder to all his children as tenants in common for life, remainder, as to their respective shares, to their respective children in tail.

What we are to suppose is this:—That, in the first example, A. dies in the testator's lifetime without issue; that, in the second, there is an heir male of the requisite age at the testator's death; that, in the third, A. dies leaving a son, before the decease of the testator; that, in the fourth, the parent dies in the lifetime of the testator; that, in the fifth, A. dies in the testator's lifetime; and that, in the sixth, some of the children of A. to whose issue estates tail are limited, are born before the decease of the testator. Is the gift to B. in the first case, to the heir male in the second, to the children of the eldest son in the third, or the children attaining twenty-five in the fourth, capable of taking effect? in the fifth case, can the first possessor of the title be limited to an interest for his life and the absolute interest carried over to the next inheritor of the dignity, or must the first take the absolute interest by reason that if A. had survived the testator a gift to carry an interest by purchase beyond the first possessor of the title, would not have been valid? and, in the sixth, can those children who are born before the testator's death take as tenants for life, with remainders to their children, while those not so born become tenants in tail under the doctrine of *cy près;* or must the entire class of the children of A. be made tenants in tail under that doctrine, if it be applied at all?

It is, in the first place, perfectly clear that mere remoteness in words and phrases will not, of itself, necessarily invalidate the limitation. Two things must combine to produce a case of actual remoteness. There must be remoteness in the compass or *conditions of the gift*—that is, in the contingency contemplated by the expressions of the gift—and there must be a state of *circumstances* which will admit of the gift or contingency that is infected with the vice of remoteness in *appearance,* operating remotely *in fact.*

A gift may *sound* remotely, or savour of remoteness, but, upon investigating the facts to which it refers, it may appear that there are not, in reality, any *circumstances* which will admit of the gift taking effect in that particular relation, or under those forms or

conditions, out of or from which its remote character would, if at all, spring. To put a well-known rule in another branch of the law, by way of illustration:—There may be *ambiguity* in the terms of a written instrument, but the evidence of surrounding facts, which the law *always* receives in construing an instrument, may shew that, in substance and reality, there is not any ambiguity at all. The ambiguity is supposed to arise from a correspondence of the facts to the *expressions* used in the will; but if the facts do not give reality of *application* to the expressions which appear to occasion uncertainty, then, although there be a seeming ambiguity, there is none in substance and the gift will have effect; as if a man give land to "one of the grandchildren of A.," and there be, in fact, only one grandchild, that grandchild will be entitled to take under the gift. So, with regard to this question of remoteness, the clause of gift may, in appearance, indicate a perpetuity, whereas those *conditions* of the gift, in virtue of which alone the perpetuity seemed to be constituted, may not, under the actual circumstances of the case, meet with any real, practical application—may be incapable of being brought into that connection with persons and things which alone can give life and operation to what otherwise is only a form of words. Thus, a limitation to B. on the death of A. (a stranger) without issue, appears, on the face of it, to be open to the objection of remoteness; but if A. be then already dead without issue, there is, in truth, no remoteness, nor would the law invalidate such a gift.

And so, again, just as there must be scope in the *circumstances* to give reality to remoteness in the *idea* of the gift, so must there be remoteness in the idea of the gift to create, in fact, a Perpetuity suggested, in appearance, by the *circumstances*. Thus, a gift to the children of A. (a living person), to vest at their ages of twenty-five, is suggested to be a Perpetuity, by the fact that A. may have children at a future time, in respect of whom the gift would be too remote; but, if the expressions of the gift can be held to confine it to those children only of A. who are living at the decease of the

testator, there is no longer any ground for alleging against it the objection of remoteness (*j*). Thus, then, we see clearly that the facts which immediately surround the limitation, must contain within themselves elements of remoteness, and that such elements must, by the instrument, appear or be embodied in the constitution of the gift.

It would have been unnecessary to enforce this point, but that it is probable our apprehension of the bearings of the general question will be clearer, by distinctly presenting to our minds the consideration, that that question is not settled merely by shewing remoteness in the *terms* of the contingency provided for in a testamentary gift; but that we have still to find the limitation occupying a *corresponding* situation amongst the *circumstances* in or by which it operates.

The general rule as to remoteness which applies to all dispositions by will, is, that the *validity* of the limitation must be determined *at the death* of the testator, and not at any time afterwards. This rests upon three simple propositions: First, that the will takes effect from the decease of the testator; next, that the period of remoteness, in the case of a will, is to be *computed* from the death of the testator, *because* the will then takes effect and the limitations in it are then *created;* and lastly, that it must always be certain, from the time of the creation of a gift, that it will vest, if at all, within the prescribed period. About this general doctrine there can be no discussion. But the question still remains, what is the *time* for *ascertaining the facts* which are to determine the validity of the limitation? Now, it follows from the general rule which has been stated, that the testator, in arranging his scheme of disposition, may, if he pleases, by the language and provisions of his will, expressly contemplate and make use of the circumstances which will exist at the time of his death, as the hinges on which to suspend his contingent gifts. He may, by any form of words and in any manner, take the full range compre-

(*j*) See, as instances, *Elliott* v. *Elliott*, 12 Sim. 276, and *Leach* v. *Leach*, 2 Y. & C., C. C. 495.

hended in lives in being and twenty-one years from the time of his own death. If he point specifically to events to happen within the compass of *his own life*, although after the date of the will, the gifts may, without doubt, be moulded by providing for contingencies suspended *upon those events*, and certain to be ascertained, one way or the other, within the prescribed period computed with reference (not to the date of the will, but) to the events which so happen after the making of the will and before the testator's death. In other words, if it be certain, *according to the terms of the will*, that the vesting will take place (if at all) within the proper *period from the testator's death*, the gift is unquestionably valid. A very good illustration of the distinction now adverted to, is presented by the case of *Arnold* v. *Congreve* (*k*), where the testatrix bequeathed one-half of a fund to her son's eldest male child *living at her decease*, with a direction that it should be settled so that such child might enjoy it for life, and that afterwards it should go to his children. Side by side with this gift, was a bequest of the other half of the fund to the son's "other children lawfully begotten," with a similar direction that the children should enjoy the interest during their lives, and that afterwards it should go to their children lawfully begotten. The testatrix's son survived her. And, because the gift to the eldest male child was qualified by the clause, providing that it should be a child alive at the testatrix's death, the limitation to the children of that child was properly held valid: whereas, the bequest to the other grandchildren of the testatrix not being confined to grandchildren living at her death, the limitations to the children of those grandchildren were, with equal propriety, held void. Now, here we observe that, in the first of the two series of gifts, the will in terms contemplated, as the basis of the contingency which affected the gifts, an event to be ascertained at the death of the testatrix: it was *certain*, according to the *terms of the will*, that the gift

(*k*) 1 R. & M. 209.

to the eldest male child would be in a condition to vest (if at all) at the testator's *death;* and therefore it was certain that, at the death of the testator, the gift to the children of that son would be found to be such as would (if at all) necessarily vest within the prescribed limits from the death.

But suppose a case in which, according to the *language of the gift*, it is possible that, at the testator's death, it may *not* be certain that the vesting will take place, if at all, within the prescribed limits? would it then be material if, *at the testator's death*, it had *become certain* that the vesting would take place, if at all, within the allowed limits after the testator's decease? In fact, would the occurrence of circumstances in the devisor's lifetime establishing, at his death, a certainty that the vesting, if it take place at all, will do so within the proper limits after that event,—would this put the limitation in the same predicament, as if *the will* had in terms referred to those circumstances as the foundation or basis of the disposition? Thus, if we return to the case of *Arnold* v. *Congreve*, and take the gift to the issue of the children (of the testatrix's son) other than those of the eldest male child, we may suppose the son *dying in the lifetime* of the testatrix, by which means the children of the son being a finally ascertained class in the testatrix's lifetime, *the issue of all* those children would become valid objects of gift. Clearly, if the will had provided for the event of the son dying before the testatrix, the issue of each child of that son might take as purchasers under it. Then, does the circumstance of the event happening in the testator's lifetime, have the same effect, although not in terms anticipated in the will, as if it had been anticipated therein? Now, in considering this point it is material to bear in mind the doctrine to which attention has been called, viz.,—That the law takes no objection to the looking at events which happen subsequently to the making of the will and before the death of the testator, when *the will itself* looks forward to that extent in the language which it uses.

We proceed, then, to consider more closely the particular

question, can events happening in the interval between the execution of the will and the death, properly be distinguished from events which take place *after the decease* of the testator, which, it is admitted on all hands, cannot be for any purpose attended to in determining the validity or invalidity of the gift. The rule is clear, that events subsequent to *the creation* of the limitation are to have no effect one way or the other.

Now, it occurs at once to ask, when can a limitation expressed in a will be first said to be created? at the time of the making of the will? or at the death of the testator? Both as to real and as to personal estate the will *takes effect* from the death of the devisor, although, as to wills governed by the law which prevailed before 1 Vict. c. 26, a will of real estate speaks, as to its *subject-matter*, from the time of making it; such a will being, in fact, a testamentary form of *conveyance*. But, if the question (when was it created?) is to be determined by ascertaining when the rights of the devisee first commenced, or had any existence, in legal contemplation, either actual, potential or national,—and again, whether, when in existence, they had a *relation back* to any earlier period,—if the question is to be determined by such considerations as these, it must unequivocally be answered that the creation of the gift is at the decease of the testator, and not a moment sooner. At no earlier period has the object of it any sort of *status* in reference to the ownership of its subject: he is, prior to that period, an entire stranger; and, when the interest does take effect, there is not the faintest trace of any relation back to a period anterior to the testator's decease. But the law does not leave us without an explicit answer to this question; and the answer, moreover, goes direct to the very class of cases under consideration. It is permitted a testator, as we have already seen, to make use and take advantage, in the dispositions of his will, of every event which may happen in his lifetime, just as if it were an event ascertained when the will is made. Provided he contemplate *expressly* the period of his own decease, or events preceding

or contemporaneous with his decease, his dispositions may be regulated by reference to that period or those events, as the initiation of the remoteness which the law allows him to introduce into those dispositions. This, then, conclusively shews that the time of the creation of a testamentary limitation is, in law, no less than in common life, the death of the testator; for otherwise it would be impossible for a testator to initiate a gift by reference to events, as they may be found to exist at that time, and which have not happened at the time of making the will; just as it is impossible for him to make the validity of the gift contingent on circumstances happening *after his death.* And, be it observed, there is no distinction upon this important point, between wills of real and of personal estate, even under the old law.

Then, if the will take effect to all intents from the death of the testator, from what period does it speak when providing for future events. Is it to be interpreted just as if the testator had died immediately after the making of it? or as if the making of it had immediately preceded the death of the maker? First, let us inquire whether there be any just analogy in the law of testaments by which this point ought to be governed; and, next, what is the true and exact position of a person who is engaged in making a will which contemplates future uncertain events.

First, the *capacity* of the legatee to take is referrible entirely to the death of the testator; if he be then an alien, or a convicted traitor, or if the object be a corporation not licensed (previously to the testator's death) to hold land, the gift in each such case fails, so far as respects any interest in the legatee. But, if a person who, at the date of the will, was an alien, or a convicted traitor, has subsequently before the death been naturalized or pardoned, or if the corporation which, at the making of the will, was unlicensed has, by the time of the death, obtained a license, then in such case the gift is operative. So, again, the *existence* or non-existence of the object described in the devise is to be ascertained at the time of its

taking effect, and not before. If there be an immediate bequest to the children of A. (who, at the date of the will, may be unmarried), the children born to him in the interval between that time and the death, are the objects of the gift. So, the *form*, *effect*, and *operation* of the devise frequently depend on the state of the circumstances at the testator's death, as distinguished from those at the time of making the devise. Thus, if one of several persons made tenants in common by the will die before the testator, the gift operates to the extent only of the interests intended for those who have survived; while, if it be a devise in joint-tenancy, the surviving devisees take, by virtue of such an intervening occurrence, a larger interest than would have fallen to them without it. And this is still more remarkably seen in the well-known rule in *Wild's* case. When a testator devises to A. and his children, they are joint-tenants, if A. have children when the testator dies (*l*); but if, at that time, A. have no children, then he is tenant in tail. Why? because, there being no children to participate under the gift (at the time when it takes effect) according to the particular mode contemplated by the testator, his intention, in a general sense, shall be effectuated by a variation in the form and manner of the gift. This doctrine is entitled to special weight in the argument before us. So, again, the ancient, and perhaps antiquated, distinction respecting gifts *per verba de præsenti* and *per verba de futuro*, is directed solely to the consideration that, at the time of the death of the testator, there may not be any circumstance to give effect to the disposition, and then the question arises whether, according to the proper construction of the gift, an immediate or prospective ascertainment of the person or the event, was intended by its author.

(*l*) The writer has not hesitated *thus* to state the doctrine, it being manifest that, to state it in any *other* way (as referring only to the existence, or otherwise, of the children when the will is *executed*) is not compatible with the reason and principle of the rule contained in the very terms in which it was originally propounded. *Wild's case*, 6 Co. Rep. 17; and see *Scott* v. *Scott*, 15 Sim. 47; *Read* v. *Willis*, 1 Coll. 86, 1 Jarm. Wills, 310.

And, once more, a limitation will be either a remainder or an executory devise, and will fail or take effect as the result of its being the one or the other of these, according to events as they appear at the time of the testator's death. If there be a gift of land for one hundred years, and, subject thereto, to the first son of A., who has no son at the time of the testator's death, the limitation to that son is an executory devise, because it would fail altogether as a contingent remainder for want of a freehold estate to support it; but if, at the testator's death, A. has a son, the limitation to that son is a vested remainder. And so, again, if we suppose a gift to A. for life, remainder to B. for a term of years, remainder to the first son of C., who has no son at the testator's death, this last gift is a contingent remainder if A. survive the testator; but if A. die before the testator, it is an executory devise. So that the whole complexion of a testamentary limitation,—its liability to destruction or failure as a contingent remainder, or its freedom therefrom as an executory devise,—may depend, wholly and solely, upon the course of events subsequent to the making of the will, and before the testator's death.

There is, then, a very powerful analogy leading to the conclusion that the will, when it refers to future events, must be read as speaking from the time of the death of its maker, and not from the date of it. There is, perhaps, one class of cases which may seem to form an exception to this general conclusion. It is clearly settled that, in the case of an engrafted executory gift depending upon a future event, if the event happen in the lifetime of the testator, the gift takes effect forthwith, and this, although the limitation upon which it is engrafted may never vest, by reason of the death of the object of it in the testator's lifetime, or from his not satisfying the terms of the limitation at the testator's death. To some extent, this doctrine certainly gives effect to the dispositions of the will upon a construction which seems to regard the testator as speaking from the time of making his will, and not from a later period. But there are obvious grounds for this

rule, which render it unnecessary to do more than refer to it here as just suggesting an appearance (at least) of inconsistency with the view of a testator's provision for future events in his will, which the law generally takes.

Adverting to the rule in our law which invalidates dispositions in a will upon account of events happening after its execution,—the doctrine ordinarily termed *lapse*,—it must be clear that the ground of that doctrine is that the will speaks *from the death*, for since, at the death, it is found there is not then a person answering the description of devisee contained in the will, it is held to fail for want of an object; just as if the testator had given the thing to a person who was already dead when he made his will. And it will be observed that this applies whether the subject-matter be real, or only personal estate; so that, although a will, in regard to some portions of its *subject-matter*, was, until recently, read as a present conveyance relatively to the time of its execution, and could not, consequently, operate upon subsequently acquired interests; yet, as to the *other* circumstances of the gift,—the person, the time and the contingency,—the disposition was construed as speaking from the testator's death only.

That a will speaks from the death of the testator in some most important particulars, is further seen in the well established doctrine that, under gifts to classes of persons, as children, grandchildren, &c., or to persons filling a particular rank or position among such classes, as "first," "second," "younger" child, &c., the operation of the gift is not (except when it happens to indicate a special intention to the contrary) confined to persons who answer the specified description at the time when the will is made. It is impossible to say that to refer to events happening after the will and before the death, for the purpose of determining the *validity* of the gift, is a more violent act than to ascertain *the very objects* of the gift, by events at the time of the death, exclusively of any previous period or any other events. But, (more forcibly still) there are cases with reference to the class of gifts just now

referred to, in which it may be shewn that, according to well established rules of law, the *validity* of a gift to children, &c., even under the Rule against Perpetuities, may, and sometimes does depend upon the course of events subsequent to the making of the will. When an *immediate* gift (one that is not by way of remainder, or reversionary) is made to the children, &c., of a person *in esse*, if it happen that, at the death of the testator, there are *no* such children, the gift does not fail, but takes effect, as an executory bequest, in favour of *all* children afterwards coming into existence. But when, on the other hand, in such a case, there *are* members of the class living at the time of the testator's decease, the rule is, that such children, &c., *then* in existence shall *alone* take; and that none born afterwards shall participate. Here the scope and extent of the gift, and the ascertainment of the objects of it, are regulated solely by the course of events subsequent to the making of the will. Now, if we suppose the gift in such a case to be so framed as to include only those children, &c., of the living person who attain some particular age above majority, say twenty-two, but not otherwise, what will be the result of there being *no* objects answering the description and capable of taking at the testator's death? Clearly, it would then be an executory gift; and, looking at the constitution of the gift, it is clear also that the vesting of it might not take place until more than twenty-one years after the death of the living person named, and, consequently, it would fail. But if, on the contrary, we suppose the other event to happen, of there being an object or objects to take at the testator's death, the gift at once operates in favour of those objects, to the exclusion of all others, and there cannot in that case be any question of remoteness. This presents a strong and clear example of the effect of those rules in our law which, in ascertaining the objects of a testamentary gift, regard the circumstances of the family, &c., as they exist at the testator's death, irrespectively of those which existed at the time of the will. But, there is yet another case, of application no less strong to

our present argument. A testator devises land to A. for a term of one hundred years, and, subject thereto, to the first heir male of a living person (B.) who shall attain twenty-one; B. survives the testator; or dies before him, leaving no heir male of the specified age alive at the testator's death. What is the limitation? an executory devise. Is it valid? it is not. Why? because it is an executory limitation to vest upon an event which may not happen within lives in being and twenty-one years from the testator's death. But, suppose that, when the testator dies, B. is dead, and that there is an heir male aged twenty-one. What is the limitation under those circumstances? a vested remainder. Is it valid? it is. Why? because it is a remainder which at the testator's death it is found cannot possibly violate the rule of law. If there be such a thing as argument from analogy, we certainly find it here.

Let us next proceed to observe that there are *various kinds* of illegality in testamentary, as well as other dispositions. Some of these are positive and absolute illegalities, quite independent of any relation to particular times or events. Such are, the limiting over an absolute fee upon the death of the devisee without heirs, to a person not a relative of the first devisee; or the limiting it over upon his dying without having disposed of the property (*a*); or upon his alienating or charging it. Such, again, is the bequest of consumable articles by way of remainder after a gift thereof for life, or after a gift thereof to a person and the heirs of his body, or the like. These are incurable illegalities, and it may be considered clear that the accident of the death of the devisee in the testator's lifetime without heirs or his death in the testator's lifetime (as would almost necessarily follow) without having disposed of the interest, or his contracting in the testator's lifetime for valuable consideration in such a manner as to create a charge upon the interest given to him by the will, would not at all assist the operation of the limitation-over, which, if such events had happened *after* the death of the testator, would clearly not have taken

(*a*) *Sed qu. Doe d. Stevenson* v. *Glover*, 1 C. B. Rep. Vide *post.*

effect in consequence of them (albeit the very events provided for by the testator). And so, in the other case referred to, the death of the first legatee of the consumable articles in the testator's lifetime, or (according to the variation of the case) his death without issue in the testator's lifetime, would not give effect to the limitation-over which, upon the ordinary rule, is void (*m*). But, when the source or cause of the illegality consists entirely in the remoteness of the relation or connexion between certain times or events, it is not only consistent with, but is of the very essence of, this cause of illegality, to make the existence of the illegality dependent upon the results of the inquiry at the proper season (which, in the case of a will, is the testator's death) whether there is, in fact, that extent or measure of remoteness which brings the gift within the conditions of illegality. There is no violation of the integrity of the rule in such a conditional application of it: there is, on the contrary, a strict attention to its essential points. It is not to say, that the accident of the event happening in the testator's lifetime, shall give effect to that, as legal, which, in itself and originally, is illegal; but it is to say that there is not, in truth and substance, according to the actual facts of the case, that immoderate remoteness which constitutes illegality, although, in external appearance, the thing seemed otherwise. There are, necessarily, two extreme points in the supposed term of remoteness, by measuring the distance between which the legality or illegality of the remoteness is ascertained. Of these, the initiatory is the day of the testator's death, and not any earlier or other period; and the other is the time appointed by the will for the vesting of the gift. Now, consistently with these essential ingredients of the doctrine, what propriety can there be, in adverting to any state of circumstances which existed at an earlier period than the testator's death, in order to find out whether the term of remoteness be valid or not?

(*m*) *Andrew* v. *Andrew*, 1 Coll. 690. There is, obviously, an *essential* difference between executory gifts of *consumable* chattels, and executory gifts of *other* specific chattels, or of chattel *leaseholds*.

But, there is another consideration which goes a great way towards furnishing a conclusion upon the present argument. Every disposition in a deed or will, after it appears in the writing, remains to be applied to the circumstances. Its operation depends upon its application to those circumstances, without which it is nothing. For the purpose of ascertaining its operation by this application of it to the actual facts of the case, evidence of all those circumstances which are material to such a purpose, is admissible, and, upon the purport and tenor of that evidence, depends the effect to be given to the disposition, and sometimes even the construction of its terms. For the purposes of *construction*, it might be that, in *some* cases, evidence of facts contemporaneous with the making of the will, and no others, would be admitted, because the nature of the question of construction, in the particular case, would render any other course improper. But, for the purpose of giving application and operation to the gift, and determining the extent and manner of that operation, regard must, invariably and by an invincible necessity, be had to the facts as they exist at the time of the testator's death. Without looking at such facts, neither the object, nor the subject, nor the qualifications annexed to the gift, nor any other particular in it relating to external circumstances, can be at all either known or understood. By the very necessities of its condition as a disposition to which effect is to be given, the first and earliest requirement is, to find out and apply the facts of the case as they appear at the death of the testator. Then, the question which follows,—what is the *legal effect* and *character* of the disposition,—is this not to be answered by still adverting to the same circumstances from which the very capacity of the gift to have existence at all, has been ascertained? The legal validity, or invalidity, of the gift, is an inquiry which cannot be entertained until it has been first seen what capacity of operation the circumstances would allow to the gift; but if, for this preliminary, primary purpose, it is essential to know and decide from the circumstances which existed when the

testator died, how can it be otherwise than proper,—how otherwise than necessary,—in determining the *consequential* inquiry (whether the gift be *valid* in law), to apply those facts from which alone it is that the very *existence* of the disposition as an actually operative and effective one, has been ascertained?

We will here consider the distinction, under the old law, between devises of real and of personal estate.

That a will spoke from its execution for some purposes, as to real estate, cannot, of course, be denied. Until the recent alteration of the law concerning wills, it did so speak, in reference to its operation upon the *subject-matter* of the gift, when that subject-matter was real, and not personal estate. But this depended upon an entirely distinct and technical principle; and it was not the universal rule (as is presently noticed). The inoperativeness of a will upon freehold estates acquired after the making of it, was grounded on an interpretation of the devising clause in the Statute of Wills; and, in the case of copyholds, the will operated upon such property subsequently acquired, only when the surrender to the uses of a will was so expressed as to extend to a will made previously to the surrender. But, it is entirely a different question, from what time the will speaks for purposes *other than* the effect and operation of it upon the subject-matter. A most considerable exception is at once found in the doctrine already adverted to, that in many cases the objects of a gift of real, no less than of personal estate, are to be ascertained according to the state of circumstances at the testator's death, and cannot be ascertained before. It is quite impossible, consistently with the well established rules of law on that subject, to carry the notion of the will speaking, in reference to realty, from the time of its execution only, to such an extent as to exclude *all* attention to events happening after that time. Nothing can exceed in importance the ascertainment of the objects of the devise, and if, for that purpose, we are at liberty to look at events subsequent to the execution, there is an end

at once to all contention that, in adverting to such events for determining the validity of a gift under the Perpetuity-rule, violation is done to the principles of our law. But, what can be said of any distinction between gifts of realty and personalty, when, even under the old law, by the ancient custom of devising in particular places, freeholds which the testator acquired after making his will might sometimes pass thereby? The only considerable question, then, that remains to be decided, in regard to real, as well as personal estate, is, whether there is positive *authority against* the doctrine now under review; whether, in fact, it is a *settled rule* that, in determining questions of testamentary remoteness, attention cannot be given to events happening after the date of the will.

Before proceeding, however, to that inquiry, let us ask what is the true position of a person who sits down to make a will contemplating future uncertain events, with regard to such of them as may happen in his lifetime? Of course, this is a suggestion subordinate entirely to anything of positive doctrine on the subject which may be contained in our law. But, we are at liberty to say that there is no unvarying absolute principle to preclude inquiry in relation to such a point, from the fact, which has already appeared, that for many purposes the law holds the will to speak from one period, and for a few technical purposes from another period. Looking, then, at the reason and substance of the thing,—A testator knows when he is engaged in making the declaration of his will, that it is essentially a prospective act which is to have effect from a future period, his own death; and he knows that, if he make a gift which embraces, or depends upon various events and contingencies, the actual relation of the will to those events and contingencies, is a thing which cannot be decided at that moment when he is making the will, but must be determined when it takes effect. In everything he expresses and provides by the instrument, he feels and believes himself to be speaking from the moment of his dissolution, and not before. In making allusions to the future he knows that it is a future relative to

and dating from the period of his death. He says:—"I might defer the settlement in writing of all these arrangements until the day previous to my death, if only I could be sure of knowing that day, when it comes—if I should *certainly* have the opportunity of writing my will; but, as I am not sure to have the day for that purpose, I must provisionally arrange the matter now, to abide the event when it comes, and to be applied in connexion with the occurrences and circumstances which at that time may be concerned in the provisions I shall have made." It is true, the maker of the will is conscious to himself that, if he dies the next moment after the signature of the writing, he intends his dispositions to be just what he has expressed; but he also feels that, according to his then present mind and intention, his dispositions are precisely those which, if the delay were prudent, he would make at the moment before his death, though it happen not for several years. Now, the very fact that his position may be represented in this twofold aspect, shews that the time of his death is the one precise point which forms the nucleus of his scheme of disposition; to it everything expressed in his will is meant to bend and incline, and from it everything to stretch forth and spread. And, if there were no rule or principle of positive law to be consulted upon the question, it would be an irrefragable conclusion from both the reason and abstract theory of the thing, that, supposing there are rules of law to which, in order that his dispositions may be valid, the testator must conform in providing by them for external circumstances, the time for ascertaining and determining, by examination of the external circumstances, whether he has in fact done so, is the period of his decease, from which he conceived himself to be speaking, and his will to come into operation. Any other conclusion than this would (if independent speculation were open to us) appear illogical, unnecessary and unjust; true though it be that, in making this remark, we disparage and censure the provisions of the civil law (*a*).

(*a*) See a very apt quotation by Sir J. L. Knight Bruce, V. C., 1 Coll. 425, n.

Here, to avoid misconception, let us make free from doubt what is the precise point and turn of the argument.

The doctrine now under consideration is, that, just as the validity in respect to remoteness of a limitation by deed, is to be determined, not simply by the expressions of the deed, but by reference also to the circumstances existing at the execution of the deed when it takes effect, so the validity in respect to remoteness of a limitation by will, is to be determined, not simply by the expressions of the will, but by reference also to the circumstances existing at the death of the testator when the will takes effect. And what, in each case, is the test of the validity of the gift with reference to those circumstances? In each case, it is this: —That it must be absolutely certain, at the time in question (the execution of the deed or the death of the testator), that there will be no Perpetuity by virtue of the limitation. If it be *possible*, when the deed is executed, or the will takes effect, that the vesting may be postponed beyond lives in being and twenty-one years from that time, the gift is confessedly void. There is not to be any regard to circumstances which have taken place, or may take place, after the deed is made or the testator is dead. To preclude all doubt upon this important feature in the argument, let us revert to the six examples with which this discussion was prefaced. If, in the first case, A. dies without issue before the testator, there cannot, by any possibility, be an actually remote vesting of the gift to B. If, in the second, there be an heir male of the age of twenty-one, or other age specified, when the testator dies, actual remoteness is out of the question. If, in the third, the son of A. be living at the death of the testator, it is impossible that the gift to the children of that son can vest at a period too remote from the testator's death, because, the son being a person *in esse* when the testator dies, the term of suspension is, at the furthest, a life in being. But if, in that case, there be no son of A. living at the death of the testator, then the argument now under consideration does not apply, and it is admitted that, as

there may not be children of the eldest son within twenty-one years after the life in being, the gift to these children is void, although, in the event, those children should be born before A.'s death. If, in the fourth example, A. (the parent) die before the testator, the gift becomes merely a gift to a class of persons *in esse*, at their ages of twenty-five, which, of course, is perfectly good. But if A. should *survive* the testator, (then having children) the gift is admitted to be void, although there should not, in fact, after the testator's decease, be any other children born to A. If, in the fifth case, A. die before the testator, there cannot possibly be undue remoteness in confining the first taker of the barony to a life interest, and carrying on the absolute interest to his successor, because, as the first taker will be ascertained at the testator's death, the second will be a person to be ascertained at the expiration of a life in being, which cannot be too remote. The chances of abeyance or forfeiture of the dignity (to which reference was made in *Tollemache* v. *Coventry* (*n*)) are nothing to the purpose, because the rule is, "*if* the limitation take effect *at all*, it *shall* take effect, &c." But, in this last case, if A. should be living at the decease of the testator, it is conceded that the absolute interest must be given to the person first answering the description of Baron B., because it is possible *he* might be a person *unborn* at the testator's death, and then the next inheritor of the dignity would be an individual not capable of being ascertained until the decease of a person not yet *in esse*, or of one who may prove to be an unborn person; and so the limits of the rule would be transgressed. And it would be admitted, in this case, that the fact of there being persons living at the death of the testator, who would *certainly* succeed to the title, if living at the time, would make no difference; since they would take, not *because* they were existing individuals *designated by the gift*, but because they filled a *certain character* which *might* have belonged to *others* not born, who

(*n*) 8 Bligh. 565, 6.

yet were equally the intended objects of the limitation. And if, in the last of these six cases, any of the children of A. are born before the testator, the gift to their children cannot possibly vest at a period too remote, because, in effect, it is a limitation to living persons, with remainder to their children in tail; but if no child of A. were born before the testator, then the gift to the children of the children of A. is admitted to be altogether void, although it should subsequently turn out that there are no children of children born, except during the life of A., the tenant for life *in esse*.

Upon examining the circumstances of the different cases in which testamentary gifts have been held void for remoteness, it will be found that in most of them it was not certain, either according to the terms of the will or the circumstances at the testator's death, that the vesting would take place, if at all, within the allowed limits from the time of the death. Such cases, therefore, are authorities neither for nor against the proposition now under review (*o*). Of course, it is obvious that the cases (such as the gift to the children of the eldest male child in *Arnold* v. *Congreve*) in which it was certain, according to the *expressions of the will*, that the vesting would take place, if at all, within the prescribed period from the time of the testator's death, are not material to the present purpose; because the gifts, in those cases, would be held valid, quite irrespectively of any events which might take place between the making and taking effect of the will. The question would, of course, be concluded, were there any established authorities in which, it being not certain according

(*o*) Take, as examples, *Proctor* v. *Bath and Wells*, 2 H. Bl. 358; *Somerville* v. *Lethbridge*, 6 T. R. 213; *Seaward* v. *Willock*, 5 East, 198; *Jee* v. *Audley*, 1 Cox, 324; *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213; *Vawdrey* v. *Geddes*, 1 R. & M. 203; *Arnold* v. *Congreve*, 1 R. & M. 209; *Tollemache* v. *Coventry*, 5 Mad. 8 Bligh. 547; *Mackworth* v. *Hinxman*, 2 Keen, 658; *Hunter* v. *Judd*, 3 Sim. 525, 4 Sim. 455; *Porter* v. *Fox*, 6 Sim. 485; *Dodd* v. *Wake*, 8 Sim. 615; *Newman* v. *Newman*, 10 Sim. 51; *Ibbetson* v. *Ibbetson*, 10 Sim. 494; 5 My. & Cr. 26; *Dungannon* v. *Smith*, 12 Cl. & Fin. 546.

to the language of the will, but certain according to events at the testator's death, that the vesting would take place, if at all, within the proper limits, the gift was on that account deemed valid. Before inquiring, however, into the two or three cases of modern date, in which the facts have taken this turn, it will be well to notice the manner in which, from time to time, as occasion has arisen to glance at the question, it has been treated in the Courts. In the case of *Jee* v. *Audley*, Lord Kenyon had been pressed that, as there was not really a possibility of children being born, after the testator's death, to John and Elizabeth Jee, he should hold that the gift was intended for children living at the decease of the testator, which, it was considered, would be a valid gift; but the learned Judge's remark was,—"I am desired to do, in this case, something which I do not feel at liberty to do; viz.—to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee, to have children." Now, the objection thus raised by Lord Kenyon would have been misplaced, if he had considered it impossible, as a general rule, to advert to any circumstances occurring after the date of the will; but, instead of this, he objects to the vagueness of a conjecture of the particular description proposed, and seems, by his mode of answering it, to imply that if, by reason of the *death* of either John or Elizabeth in the testator's lifetime, it had been *absolutely impossible* (instead of a mere conjecture of impossibility) that there should be after-born children, there would be no longer any objection to the gift. The case of *Gower* v. *Grosvenor* contains remarks from Lord Hardwicke, which make it bear upon our present subject. He observed,—"It is insisted that the limitation to Sir Robert Grosvenor would have been void, though Sir Thomas Grosvenor never had a son, and that it is to be considered as good or bad, according as it stood at the time of making the will, and that no event afterwards happening can make it better or worse;" and he then proceeds to put the case, of a gift of personalty to A. for life, and then to B. and the heirs of his body (B. being *in esse*),

and then to C.; and says—"No event can make it better or worse, and though B. dies never so early, though within the compass of a life from the death of the testator or the making the will, that will not vary the case, because it was bad in its creation, and there was no contingency: he gave it upon certain facts, which, in point of law, made the subsequent limitation void." Nothing turned upon the distinction between events before the execution of the will, and events after it but before the death: but it may be collected from these observations that, as applied to a gift of personalty to A. and the heirs of his body, and in default of issue over, the circumstance of the contingency of failure of issue happening in the testator's lifetime did not, in Lord Hardwicke's opinion, impart validity to the gift over (*p*).

The subject now under consideration presented itself again in the discussion of *Lord Deerhurst* v. *Duke of St. Albans*, where it was contended by the very able counsel for the parties who ultimately prevailed in the House of Lords, that the Court must look at the will with reference to the period of its execution; must see the objects designated to take, and the order in which they were to take; and must say in what mode the Court would have prepared a settlement at the moment of the execution of the will, if the testator had then died: and they proceeded to conduct the argument upon the footing that the test of remoteness in that case was to ascertain whether it was certain that the first of the series of persons who were to take, under the description of Lord V., would be a person *in esse* at the time of making the will. The counsel on the other side also gave an interpretation of the case of *Humberstone* v. *Humberstone*, as decided upon the principle of vesting estates tail in all persons not born at the time of the will. Upon the argument of the same case on the appeal, the counsel for the successful parties again urged the view

(*p*) In this view of the case, it is the authority which (as to the doctrine of it) may, perhaps, be considered to have been *followed* in the case of *Harris* v. *Davis*, mentioned subsequently.

that the will must be considered with reference to a settlement at the period of its execution. In the judgment delivered by Lord Chancellor Brougham reference was made to the circumstance that the person who, secondly after the death of the testator, became Lord V., was *in esse at the date of the will;* and the *relevancy* of this fact so stated was not denied; but the *influence* of the fact was removed by adding that, whether he would take or whether he would ever be Lord V. *was at the time uncertain;* which seems to admit the validity of the test founded on the state of facts at the date of the will, and not at the testator's death.

In the case of *Ibbetson* v. *Ibbetson*, Sir L. Shadwell indicated his impression of the rule, in the words—"The validity of the gift must be determined by considering how it stood *at the death* of the testator; and unless it was then such as that, if it ever took effect at all, it must, of necessity, have vested the absolute interest in some one within the period allowed by law, it was bad then, and must be so now."

We now proceed to notice what passed in the late important case of *Lord Dungannon* v. *Smith*. It is plain, upon reading this case, that the very point now under discussion, was present to the minds of many of the Judges who delivered opinions to the House of Lords; although nothing turned directly upon it in the way of *adjudication*, since it was uncertain, not only at the date of the will, *but also at the death of the testator*, whether the gift to the heir male of the body of Arthur Trevor, attaining twenty-one, would vest within lives in being and twenty-one years from the time of the testator's death. It cannot be denied that much fell from the Judges in this case, which, though not essential to the actual decision of it, is clear and explicit upon the present question. The Judges who attended the argument were Lord C. J. Tindal, and J. J. Patteson, Williams, Coleridge, Coltman, Maule, Wightman, and Cresswell, and B. B. Parke, Alderson, Rolfe, and Platt. Mr. Justice Cresswell, in delivering his opinion, remarked—"*At the time when the testator died*, it was impossible

to foresee, &c." Mr. Justice Wightman said—"A will of personalty takes effect from the time of the testator's death, and, if circumstances extrinsic of the will itself are to be considered at all, they must be those existing at that time. *When the testator died,* B., the grandson, was under age and unmarried; there was no heir male of his body, and it might be that there never would be one." "*At the time of the death of the testator,* there was no certainty that the devise of the leasehold would take effect within the period allowed by the rule." "The case must be considered as it stood *at the time of the death* of the testator; *when he died,* it was uncertain whether, &c." "Though a person answering a certain description was to take, it was quite *uncertain at the testator's death,* who that person would be, and whether there would be any such within the limits of the rule." Mr. Baron Rolfe observed—"My opinion is founded on what I consider to be an undisputed rule of law, namely, that an executory bequest is bad, unless it be clear, *at the death of the testator,* that it must, of necessity, vest in some one, if at all, within a life in being and twenty-one years afterwards. In the case propounded by your lordships, it would be impossible to say, *at the death of the testator,* that the leaseholds bequeathed by his will must necessarily vest, if at all, within that period; and so the whole gift is, in my opinion, void for remoteness." Subsequently, the same learned Judge, alluding to a suggested interpretation of the gift as divisible into distinct parts, observed—"There is no doubt but that such a gift would be good as to the person who should be heir male of B. at his death; it would be good *because, at the death of the testator, it would be absolutely certain* that the bequest must take effect, if at all, within twenty-one years after the death of B." Mr. Justice Maule said—"The question is, whether, *at the death of the testator,* it was certain that this event would happen within the time allowed by law;" and the subsequent observations of this learned Judge are entirely consistent with the opinion thus, in the outset, expressed by him. Mr.

Justice Coltman, putting a case of a bequest, after the death of B., in trust for J. S., until some heir male of B. should attain twenty-one, and then to such heir male, observed—"That, in such case, if *B. survived the testator*, the gift to such heir male would be void, on the ground, &c." With reference to the case under consideration, he said—"Whether the first heir, or some other person, would answer the particular description, was, *at the testator's death*, quite uncertain." "It was quite possible, *at the testator's death*, that neither A., nor any other person, might have answered the description for a century, and, therefore, the limitation cannot be sustained." The late Mr. Justice Williams said—"It was admitted that the validity of a gift must be determined by considering how it stood *at the death of the testator.*" Here it may be remarked that all the before-mentioned learned Judges who thus agreed in stating the rule in the terms which have been mentioned, were, nevertheless, among the majority with whom the House agreed in holding the limitation, in the case before them, *void* for remoteness (as not *certainly* to vest, if at all, within the necessary period after the testator's death). It was, therefore, not a view adopted for the purpose of assisting a conclusion in the particular case, in favor of the validity of a gift which, upon any other view, would have failed; and, under such circumstances, the agreement in this one particular of the Judges who held the gift void, with those who adopted a different conclusion, is not unimportant. Mr. Justice Patteson said—"I apprehend that, in order to arrive at the true meaning of the will, it must be *taken to speak as from the death of the testator*, and be construed without reference to any rule of law respecting remoteness." Mr. Baron Parke said—"It is perfectly clear that the limitation is to be construed as it would be read on the opening the will *at the testator's death*, and every limitation in a will by way of executory devise or bequest which, *regarded at the time of the testator's death*, will not necessarily take effect, if it take effect at all, within the space, &c., is void." Again—"A bequest to the first heir male of the body of B. who should attain

twenty-one, *supposing that the heir male was not of age at the time of the testator's death*, would certainly be bad. In like manner, *supposing the heir male were not a minor at the time of the testator's death*, the direction to permit the heir male, being a minor, to take the profits till his majority, if it stood alone, would be void." "In the first of the above cases I have supposed that the heir male of the body was not of age *at the testator's death;* if he was of age then, *as the will speaks*, quoad *the person to take, as at the time of the testator's death*, the bequest to that heir male would, I apprehend, be good; and, in like manner, in the second case, if the heir male were a minor at the testator's death, the bequest to him would also be good. In speaking, therefore, of the supposed cases, of separate bequests, I assume throughout that, *at the death of the testator* there was no heir male, major in the one case, and minor in the other, in existence at *the testator's death;* and no doubt your lordships' question, refers to a person, A., not in existence at the testator's death. If, then, the direction as to the profits, and as to the *corpus*, had each stood alone, in separate instruments, I should have felt no doubt that both the bequests would be void, inasmuch as it could be truly predicated of neither, *at the testator's death*, that it would necessarily take effect, if at all, within the limits." "It is clear that, according to the true construction of the words of this conjoint bequest of both profits and corpus, *reading them at the testator's death*, some benefit, &c." "A bequest to a class or number of persons to take together, is altogether void, if it is in suspense *at the death of the testator*, and that suspense may continue for longer than the prescribed limits." "I say, that the bequest is void, if in suspense at the testator's death, and that suspense may continue beyond a life or lives in being and twenty-one years; for if, at the testator's death, it is not in suspense, or, being in suspense, such suspense must be determined within the limits, I apprehend it would not be void. A bequest to A. for life, remainder to such of his children as should attain twenty-two, the bequest is void if the testator

dies, living A.; but not if he survives A., and at the testator's death all A.'s sons have attained twenty-two (*q*), for then the number of persons is ascertained at the testator's death." The extended observations which thus fell from this very learned Baron, upon the present subject, go direct to the distinction which has been contended for, between events prior to the will and prior to the death; and the opinion expressed by him, seems to have been the result of special attention to that point. Nothing fell from B. B. Alderson and Platt, upon the specific question now before us. The only instance, among the whole twelve Judges who were present, in which a designed reserve is shown, in not expressly concurring in the terms in which the general rule was laid down by the other Judges, is in the case of the late Lord C. J. Tindal. His lordship held the bequest void as being "not so limited," as necessarily to vest within the period of time prescribed; he stated the well-known rules, that the limitation not only may, but must take effect within the period, and that if "at the time of its creation," the limitation is so "framed," as not necessarily to take effect within the prescribed period, it will not become valid by reason of the "happening of subsequent events;" but the Lord Chief Justice nowhere explicitly states what was the period to which he referred under the description—"the time of its creation," nor whether by "the happening of subsequent events" were meant all events subsequent to the will, or those subsequent to the death only. He expressed, in conclusion, his opinion that the bequest was void, by reason of the property "being made unalienable" during a possible succession of minorities, which might extend beyond the "period allowed by law." The caution thus shewn by this very sound Judge, seems the more marked from the almost universal explicitness of the other Judges in subscribing (not-

(*q*) It is submitted that it was tendering an immaterial issue, to say anything about the *ages* of the children of A. Moreover, the example seems altogether inapplicable to a limitation of freehold *land* by way of *remainder*. Vide *post*.

withstanding differences on other points) to the doctrine, that the validity of the gift is to be decided by the facts as ascertained at the testator's death.

The doctrine to which, as we have now seen, so many Judges have, not indistinctly, given their adhesion, has been applied in the adjudication of two or three recent cases. In the case of *Mackinnon* v. *Peach* (*r*), there was a bequest of plate to be divided between the testator's daughters, M. and S.; and upon the decease of either of them without issue, then the share of her so dying was to go to her sister—with further gifts-over in case of both daughters dying without issue. M. died before the testator unmarried, and the question was, whether the share of the plate originally given to her devolved to the other daughter. It was argued, against this view, that the gift-over was void, as it was to take effect upon an indefinite failure of issue, and that, if void in the first instance, the circumstance of the death of one of the daughters in the testator's lifetime, would not cure its original invalidity. For the surviving daughter, it was said that the will, speaking not from its date, but from the death of the testator, the gift-over would, after the death of one of the daughters without issue, take effect. It is extremely difficult to collect from the judgment, as reported, what was the precise ground on which it proceeded. The Master of the Rolls is stated to have observed,—"In the event of either daughter dying without issue, (and, in this case, the deceased daughter died unmarried,) her share is given to her sister, *i. e.*, to the survivor of the two daughters, and I am of opinion that the circumstance of the deceased daughter having died in the lifetime of the testator, does not prevent the gift-over to her sister from taking effect, and, consequently, that the plaintiff is now entitled, &c." Having regard to the nature of the arguments presented to the Court, it certainly seems that the learned Judge must have intended this as a decision that the circumstance of the daughter dying in the

(*r*) 2 Keen, *555*.

testator's lifetime, *enabled* the gift-over to her sister, to take effect; but embarrassment arises from its being imputed to his lordship, that his difficulty was, (not whether the circumstance in question assisted, but) whether it *precluded*, the operation of the gift; as if, in his lordship's opinion, the gift, as expressed, was a valid gift, and the only question would be whether the subsequent event *interfered* with it. It is submitted, however, that the gift was not, otherwise than under the rule we are now supposing, an effectual gift; and the writer considers, now as formerly, that this decision must, in the absence of any authoritative explanation of it, be interpreted to have proceeded upon the principle, that a gift, although depending upon a failure of issue in terms indefinite, may have effect, if that event take place before the testator's death.

Next follows the case of *Vanderplank* v. *King* (*s*), which may, in brief terms, be represented as having decided that, where a testator gives real estate to a class of children (of whom some are born before, and others not until after, the time of his death), for their respective lives, with remainders, as to their respective shares, to the children of such tenants for life respectively, in tail, those of the first series of children who are not born at the time of the testator's death, are to be made tenants in tail, under the doctrine of *çy près;* but that such of that series as come *in esse* before the decease of the testator, are to take according to the form of the limitation as appearing in the will, namely for life, with remainders to their children, as purchasers, in tail. This decision proceeded entirely upon the consideration, that it was proper for the Court, in ascertaining whether the gifts were too remote, to advert to the state of the families at the death of the testator, and that, as the doctrine of *çy près* is a provision for remedying a remoteness which otherwise would be fatal to the gifts, it was to be applied to those gifts, or portions of gifts which, according to the circumstances at

(*s*) 3 Hare, 1.

the testator's death, would fail for remoteness, but not to any other gifts or portions of gifts. Here, then, was a decision grounded on an explicit adoption of the affirmative of the proposition now under review.

More recently, the case of *Williams* v. *Teale* (*t*) has given to the Profession the benefit of a well-considered adherence to the same doctrine, expressed in terms decisive, although without any detail of reasons:—"A point upon which my mind is made up," said the Vice Chancellor Sir James Wigram, "is that in considering the validity of the limitations in this will, with reference to the state of the testator's family, the state of the family must be looked at, as it existed at the time of the death of the testator, and not as it existed at the date of the will." "I have considered the point with much attention, and I am clear that the question to be considered is, how the family stood at the death of the testator, and not how it stood at any earlier date." The circumstances of the case upon which these observations were made, did not (as elsewhere shewn) lead to an actual application or adjudication of this doctrine; nor, with propriety, *could* it be applied to the case of *Williams* v. *Teale*; but all the weight due to the deliberately expressed opinion of so cautious a Judge, belongs to the observations which have now been quoted from *Williams* v. *Teale*.

The writer believes he has stated all of any considerable authority that can be found in the books, in favour of the doctrine, that regard may be had to events subsequent to the execution of the will and before the death. It presents, certainly, a weighty aspect in the aggregate, though, undoubtedly, to a considerable extent the opinions have been extrajudicially delivered.

But it is not to be concealed that a different view has possessed some minds, and those, too, minds long accustomed to the investigation of the law of testamentary gifts. The well

(*t*) 6 Hare, 239.

known *Treatise on Wills* most distinctly enunciates the proposition that, in deciding on the validity of limitations in a will, events taking place subsequently to the execution of the will are not to be considered. No doubt this is an opinion which sets off somewhat from the conclusiveness of the opposite authorities. Whether there is any *decision* founded upon that prevalent doctrine, depends upon the interpretation to be given to the judgment in the before-mentioned case of *Gower* v. *Grosvenor*, and the case of *Harris* v. *Davis* (*u*). In this latter case, the testator gave a freehold and leaseholds between M. M. and nine other persons, "or their lawful heirs, and in case of there being no heir, then the share or shares to be divided in equal parts amongst the surviving legatees." M. M. died in the lifetime of the testator without issue. "Heirs" having been held to mean "heirs of the body;" "or," having been construed "and;" and "surviving" having been declared to bear the sense of "other;" and the gift-over to the surviving legatees having (as the result of those constructions) been held to take effect as to the freeholds (*v*), the next question was, whether, with regard to the leasehold property, the death of M. M. without issue, in the testator's lifetime, enabled the surviving legatees to take the share of M. M. The Vice

(*u*) 1 Coll. 416.

(*v*) Suppose, in reference to the freeholds, the following argument had been urged:—A gift-over on failure of "heirs" is too remote, and objectionable also upon grounds independent of remoteness, unless reduced to signify "heirs of the body" of the prior taker; but if the prior devisee die before the testator, the gift to him entirely falls to the ground; there cannot, consequently, by virtue or in respect of *that* gift, be any *alteration* in the ordinary import of the word "heirs." If that be so, then the gift-over being upon an event which the law will not contemplate, could the event (failure of heirs general) *happening* during the testator's life, assist the gift? If it do *not* happen, by reason of there being heirs *general*, the gift-over would fail on that ground. It is a curious point which may deserve attention: viz. whether, to support the latter of two gifts, you may raise an estate tail in the object of the *first* gift, who never lives to take it, by force merely of a particular construction of the words of the gift-over, founded upon the incompatibility of a literal interpretation of it, with the operation of *both* gifts?

Chancellor Sir J. L. Knight Bruce held, that the gift to the surviving legatees being, as expressed, merely illegal or a mere nullity, was not made better by the accident of M. M.'s death without issue before the testator. The writer does not take upon himself to say, that there were such special circumstances in this case as to preclude its application as an authority upon the general question: but it certainly seems that adequate attention was not given to the question at the Bar; and it may be considered that, as merely representing what was then a general opinion, this case does not create any special obstacle to the reception of the doctrine which has been contended for in the preceding pages. The case of *Harris* v. *Davis* would rest upon the same principle with *Andrew* v. *Andrew* to which attention has already been called (*w*), had there appeared any illegality *other than* or over and above the illegality of *remoteness* in the executory gift of the chattels; but it seems clear that the only illegal ingredient in the gift-over was its indefiniteness under the doctrine of Perpetuities: there is no rule of law to preclude an executory gift of chattels (not being consumable articles) after a gift thereof passing the absolute interest, provided only the event be not too remote.

Before concluding the present inquiry, it remains to notice the provision made by the late act for altering the law of wills, with respect to the time from which the will, in every case governed by the act, is to be held to speak. The words of the 24th section of the 1 Vict. c. 26, are—"That every will shall be construed, with reference to the real estate, and personal estate, comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The point suggested by this enactment is, whether, supposing that, under the old law, a will, either as to real or personal estate, or both, so far spoke from the time of its execution, that upon questions of remoteness, events subsequently taking

(*w*) Vide *supra*, pp. 42, 43.

place had no effect,—this statute has at all varied the case, with respect to wills executed since the year 1837. It has been already stated, that, according to the writer's view, nothing, in the present discussion, turns upon the distinction, in the old law, that a will of realty passed such only as the testator had when he made it, while a will of personalty passed all he might have at his death. Whatever conclusion is to be arrived at upon the present question, with regard to a gift of personal property, must, he conceives, apply equally to a gift of real property; and *vice versâ*. But still it might be that, supposing (for argument's sake) the correct conclusion were unfavorable to regarding events subsequent to the will, in case of both realty and personalty, the recent enactment has produced an alteration in that doctrine, in the cases governed by it, in providing that, as to the real and personal estate comprised in it, the will shall speak and take effect from the time of the testator's death. The terms of the enactment, however, when duly attended to, appear not to admit of any interpretation which can render it of any value in the present inquiry. The whole effect of the provision is limited by the qualifying member of the clause,—"with reference to the real estate and personal estate comprised in it." It appears impossible to give any weight and effect to these words, consistently with the construction, that they have a bearing upon the question, from what time the will speaks in providing for the *contingencies, events* and *circumstances* to which the dispositions in it refer. If the clause is applicable to declare from what time the will speaks for *those* purposes, then, in substance, it declares so far all purposes; for there can be nothing besides the subject, the mode and the object, to give occasion to such a question. But, then, what becomes of the qualification—"with reference to the real and personal estate comprised in it?" By such a conclusion, the whole import and significance of this provision are taken away: the proviso is obliterated from the section; and the section is made to stand thus—"that every will shall be construed to

speak and take effect as if it had been executed immediately before the death of the testator." There can be no warrant for such an interpretation of the enactment, and it must, therefore, be held (according to its natural and direct meaning) to relate only to the effect and operation of the will, upon its *subject-matter;* leaving all other questions, not necessarily or fairly arising out of that point in the enactment, precisely as they were before the passing of the act. This view was, apparently, taken in the before-mentioned case of *Harris* v. *Davis,* where Vice Chancellor Sir J. L. Knight Bruce observed—" There is a section, the 24th, upon which I doubted, for some time, whether the lapse of M. M.'s share of the leaseholds, might not be held to be obviated. I think, however, that, unless there is authority for so interpreting the 24th section (and none has been mentioned), I cannot venture to do so." The writer conceives this to be the sound and rational interpretation of the act, and that the provision has no connection with the present argument (*a*).

In fine, considering the overwhelming force of the reasons (both deduced from original and fundamental principles in our law, and founded in analogy) which may be adduced in support of the doctrine, and considering also that the weight of authority is not opposed, but on the contrary is favorable to it, the author submits, as the conclusion of this protracted investigation, that the validity of dispositions in a will under the rule against Perpetuities, depends upon, and is to be determined by, the circumstances connected with those dispositions, which have happened at the time of the testator's death, although some of them may have taken place in the interval between that time and the making of the will.

But the writer desires emphatically to restrict his conclusion to the particular case of *remoteness;* for, as already observed, the same doctrine does not necessarily apply to *other* descriptions of illegality. Events happening after the execu-

(*x*) See also 1 Jarm. Wills, 291.

tion of the will cannot, he conceives, as a general rule, give any assistance to a limitation which, as it appears in the will, is illegal or void upon some rule of law distinct from that of Perpetuity. Upon this subject, the true and sound rule seems to be furnished by the case of *Andrew* v. *Andrew* (*y*), which, though in its own circumstances applicable only to the illegality that consists in making an executory gift of consumable articles, yet rests upon a principle which equally governs any other limitation that is so made as to violate some rule of law not dependent for its application upon a computation of time, or of the distance between one time or event and another.

Before closing the present chapter, some observations may be made upon the eighth of the accessory rules of remoteness laid down in the former book (*z*), viz.: that the remoteness against which the rule for prevention of Perpetuities is directed, is remoteness in the commencement or first taking effect of limitations, and not in the cesser or determination of them, provided only it be the term fixed in the original form and limitation of the gift, and is not contained in a separate clause of cesser.

Since that was written, the report has appeared of the judgment of Lord Cottenham, upon the appeal in *Ibbetson* v. *Ibbetson* (*a*), in the course of which some remarks occur bearing upon this question.

Ibbetson v. *Ibbetson*, it will be remembered (*b*), was the case of a bequest of personal chattels to be enjoyed by the persons for the time being in possession of a mansion-house under a subsisting settlement or under the limitations (of the reversion) contained in the will, *until* a tenant in tail of the age of twenty-one years should be in possession of the mansion-house, *and then* the chattels were to go and belong to the tenant in tail. This clause, it will be observed, contained two gifts:—The first in order was, a limitation to certain persons in succession until the happening of an event which might not take

(*y*) 1 Coll. 690.
(*z*) Treat. Perp. 173.
(*a*) 5 M. & C. 26.
(*b*) See Treat. Perp. 649.

place until after lives in being and twenty-one years: the next was a gift to a person answering a certain description, which description not any one might answer within lives in being and twenty-one years. Now, the latter gift would obviously be wholly bad; but, upon the author's principle (if sound), the former might be sustained. It is satisfactory to find, from the subjoined passages in the judgment of Lord Cottenham, that his lordship is not disinclined to recognize that principle.

"The title," observed his lordship, "upon which the appellant principally relied was the direction, that, until the contingency should happen, the property should be used and enjoyed by the persons for the time being entitled in possession to the mansion-house, by virtue of the limitations in the settlement or will. Under those limitations, the appellant's father was tenant for life in possession, until his death in 1839; and he, the son, never, under this direction, had any interest in the property; because the moment at which, by his father's death, he, for the first time, answered the description of a person entitled in possession to the mansion-house, at that moment, he being a tenant in tail in possession of the age of twenty-one, the event happened which determined the application of the rents under the former direction: *nor could the case have been different,* if the appellant had, at the time, been a tenant in tail in possession *and under twenty-one;* because, although the clause in the will respecting the chattels refers to the limitations of the real estate, for the purpose of describing the person who was to have the use and enjoyment of them, and, therefore, if that had been the whole of the direction, would have given the absolute property in the chattels to the first tenant in tail of the land, *yet that could not have been the result of the direction in this case,* for it does not refer to the limitations of the land for the purpose of adopting them as to the chattels, but *introduces this important difference, that all interests prior to any tenant in tail attaining twenty-one, shall be liable to be defeated by the happening of that*

event; so that if the limitations are to be considered as repeated in the clause respecting the chattels, they must be so repeated with the alterations the testator has directed, and they would therefore stand thus—to be used and enjoyed by the appellant's father for his life, and after his death by the person then entitled in possession to the mansion-house, until some tenant in tail of the age of twenty-one should be in possession thereof, and then to go and belong to such tenant in tail. The appellant cannot claim as tenant in tail in possession of twenty-one years of age, because that limitation is too remote; nor under the intermediate gift, *because that determined by there being a tenant in tail in possession of the age of twenty-one. It may be said* that if the gift to the first tenant in tail in possession at twenty-one is too remote, *so must be the direction for the application of the rents till that event should happen. If there be this objection to the direction* which the testator has made in his will, it will afford no reason for introducing into the will a gift of an estate tail, which he not only has not directed, but was evidently anxious to avoid. The gift to a tenant in tail in possession at twenty-one negatives any intention of benefiting any one who should not answer the whole of this description."

The reluctance of the Lord Chancellor to negative the argument founded on the remoteness of the event which was made to circumscribe the first or intermediate gift, may perhaps be ascribed to the circumstance that it was the same event which introduced the ulterior gift, and as that was unquestionably void, it might be doubtful whether the preceding gift could be regarded quite independently of the invalid clause which followed; whether, in fact, it was purely a case where the interest under the first gift was, in the form of its creation, bounded or limited in its extent so as, by the very terms of the gift, without any influence from or reference to the subsequent limitation, not to continue beyond the remote event specified. Some further observations will be found upon this case in another Chapter.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS APPLICABLE TO LIMITATIONS AFTER A FAILURE OF HEIRS OR ISSUE.

MANY cases have occurred exemplifying the doctrines stated in the former book on the subject of this chapter, and the writer believes that, with very slight exception, he has not to recall any of his statements as incompatible with these subsequent decisions. It will be right, however, to give a place to each of these authorities in connexion with the distributed view of the subject which was taken in the fifteenth chapter, for the practical value of an authority depends upon our observing precisely its distinctive position in the general scheme of doctrine to which it relates.

1. The broad general rule (*a*) that a limitation expectant on an indefinite failure of issue, is too remote, received application in *Montresor* v. *Montresor* (*b*), in reference to a gift of realty and personalty, "in the event of all my children dying without lawful issue." There was a previous gift of the realty to one child, as well as of some personalty to all the children; but, as the gift-over was not to take effect until the failure of issue of all the children, it was obviously a case where it could not even as to the realty be upheld, because, after a gift to one child only, a limitation-over on failure of issue of all the children cannot be supported by raising an estate tail in the first devisee.

And the rule that a limitation upon failure of *children* of a prior devisee, is, in ordinary cases, equivalent to a limitation upon failure of *issue*, was recognised in the case of *Abram* v. *Ward* (*c*).

(*a*) Treat. Perp. 174. (*b*) 1 Coll. 699.
(*c*) 6 Hare, 165.

2. The difficult question (*d*) whether the circumstance of a gift-over of realty being to "survivors" of a class on failure of issue of one or more of the members of that class, interprets the failure of issue to mean a default of issue at their death, occurred in the case of *Harris* v. *Davis* (*e*), where, in consistency with the general inclination of previous authorities, the Court held the word "surviving" in a gift-over on failure of "heirs" (which was held to mean "heirs of the body") of one of a class, to the "surviving devisees," to mean "other" (*f*); and, accordingly, that the words introducing the gift-over pointed to an indefinite failure of issue. As will be seen, some valuable authority has also been added upon this question, in its relation to gifts of personalty; but we are precluded from applying it as appropriate to the construction of a gift of realty.

3. Upon the question incidentally mentioned (*g*), of the effect of a clause providing for failure of issue of the prior devisee being associated with a provision for the event of his not having disposed of the property, an important case has been decided in the Court of C. B., which appears to be not reconcileable with the case of *Green* v. *Harvey* (*h*), cited as bearing upon that question. The case alluded to is *Doe* d. *Stevenson* v. *Glover* (*i*), where, after a devise in fee, it was provided that, if the devisee should die without leaving issue behind him, or being no such issue, and he should not have disposed and parted with the property, then it should go over. No question, it will be observed, arose here as to the effect of the clause contemplating non-disposition, in determining what failure of issue was intended; but the question simply concerned the validity of the gift-over. The Court held that the proviso referred solely to a disposition by the first devisee which would take effect in his lifetime, and not to a dispo-

(*d*) Treat. Perp. 218.
(*e*) 1 Coll. 416.
(*f*) See, upon this point, *Cole* v. *Sewell*, 4 Dr. & War. 1.
(*g*) Treat. Perp. 230.
(*h*) 1 Hare, 428.
(*i*) 1 C. B. Rep. 448.

sition by will, and this gift to take effect in the event of there being no such disposition by deed, the Court held valid, as not being repugnant to any rule of law. Whether the Court intended to draw a distinction between a clause contemplating total failure of disposition, and one that referred to non-disposition in a particular mode, or whether the Court distinguished betweeen gifts of realty and of personalty, the report does not enable us to determine, though certainly as far as the reported statements of the learned Judges extend, no ground is furnished to suppose that they intended to rely on either of the distinctions suggested. But, whether or not there be reason in such distinctions, the variance between the conclusions in *Green* v. *Harvey* and *Doe* v. *Glover* is not to be accounted for by reference to them; for in *Green* v. *Harvey*, equally with *Doe* v. *Glover*, the subject-matter was land (although of leasehold tenure), and the disposition, the absence of which the gift-over provided for, was not a disposition in *any* form, but a disposition in *one* mode only, viz. by will (*j*). At present, therefore, these authorities are opposed: but, as it is a question not itself belonging distinctly to the present work, we must leave it with the observation that the case of *Doe* v. *Glover*, as conflicting with several most respectable authorities, and as not furnishing any intelligible distinction in point of doctrine, cannot stand *concurrently* with the law which has been generally considered deducible from those authorities. If the doctrine of *Doe* v. *Glover* be sound, it is not a rule of the English law, that a gift of land on the death of a prior donee in fee without disposing of his estate, is invalid; for it seems quite hopeless to maintain any distinction between provision for an omission to dispose of the property in any way, and omission to dispose of it in one way. The

(*j*) It is true that, in one view of such a case, the testator, by referring to non-disposition by will, may be considered impliedly to include also non-disposition by deed, because he could hardly be supposed to intend depriving the devisee of the power of disposing of it in his lifetime. See *Cuthbert* v. *Purrier*, Jac. 415.

only chance left for maintaining both *Doe* v. *Glover* and the older cases, is the possible soundness of the distinction formerly taken in this particular between a gift of *real* and of *personal* estate; in which, however, there seems but little substance.

4. The doctrine which sometimes changes "or" into "and," was applied in the case of *Harris* v. *Davis* (*k*), but the gift which received this interpretation was not of the class where a limitation-over contemplates the death of the prior devisee and then refers also to failure of his issue by the disjunctive "or;" for it was a case where the gift was to several persons, "*or* their lawful heirs," and the Court construed the word "or" in this passage as meaning "and," by force of which ("heirs" being, upon another ground, restrained to "heirs of the body,") the devisees became tenants in tail. Similar to this case was *Parkin* v. *Knight* (*l*).

5. The doctrine stated in the former book (*m*) that, in the case of provision made by a person for the event of failure of his own issue, the presumption is, that he refers to the failure of such issue at the time of his own death, and not at a later period, has been recognized satisfactorily in the case of *Eno* v. *Eno* (*n*).

6. It is important to observe that, in the case just now alluded to, the question arose upon a limitation by *deed*, and not by will. The question (*o*) whether any distinction is to be taken between a deed and a will, in the construction of this class of limitations, seems to have been placed on a satisfactory footing in this case of *Eno* v. *Eno*. The Court first supposed the same description of limitation to be contained in a will, and having, upon that hypothesis, concluded that it would have been valid, proceeded to inquire whether the conclusion would be different, supposing that the disposition was in a deed instead of a will. The Court, after referring to

(*k*) 1 Coll. 416.
(*l*) 15 Sim. 83.
(*m*) Treat. Perp. 244.
(*n*) 6 Hare, 151.
(*o*) Treat. Perp. 251.

Smith v. *The Earl of Jersey* (*p*) and other cases, determined that the disposition, whether the limitations were created by deed or by will, would be equally good. The decision, then, in effect, was, that the same expressions and circumstances which, appearing in a will, would operate to restrict the failure of issue, will, as a general rule, be attended with the same effect when contained in a deed limiting an estate upon such an event. The doctrine deducible from this case is stated thus generally, because it does not appear that any stress can be laid upon the particular form in which the question arose in *Eno* v. *Eno*, so as to distinguish it from other expressions and circumstances appearing in deeds which, if inserted in a will, would have given or raised the construction of a restricted failure of issue. This case, then, so far as it extends, removes the doubt previously entertained as to the extent of analogy which might prevail in this respect between deeds and wills. But, at the same time, it must be remembered that there are cases in which a different principle of interpretation will be applied to similar clauses in a deed and in a will, in respect of what may sometimes be supposed to be the special motive to benefit particular objects (as children) in a settlement by deed, as opposed to a will where a distinguishing intention as to some objects will not, in general, be so strongly manifested or so readily presumed (*q*). It remains to ask whether the principle of *Eno* v. *Eno* was not impliedly negatived in *Cole* v. *Sewell* (*qq*)?

7. It will be remembered that there is an exception which makes valid a gift, although expressed to take effect upon a failure of issue apparently indefinite, where it constitutes, in fact, merely a disposition of an interest or reversion expectant upon subsisting estates tail. These circumstances occurred in the before-mentioned case of *Eno* v. *Eno*. Under a will J. R. was tenant for life, with remainder to M. R. for life, with re-

(*p*) 3 Bligh. 290.

(*q*) See the judgment in *Kimberley* v. *Tew*, 4 Dr. & War. 150.

(*qq*) 4 Dr. & War. 1.

mainders to the sons of M. R. successively in tail male, with remainder to her daughters as tenants in common in tail general, and cross remainders between them, and in default of such issue M. R. was to have a general power of appointment either by deed or will. M. R. exercised her power by a deed which correctly recited the will, and stated that she had not any issue, and that she was desirous of appointing the property subject to the life interests of J. R. and M. R. in manner after mentioned; and then M. R. proceeded by the deed to appoint that, after the decease of J. R. and herself the said M. R., "and there being a failure of issue of the said M. R.," the property should go to the use of J. E. in fee. J. E. having sold, an objection was taken to his title on the ground that the appointment to him was void, as being after a general failure of issue of M. R.; the will not having limited any estate to the female descendants of the male issue of M. R. But the Court held that the words of the appointment might be modified, and construed to refer to a failure of the issue entitled to take under those limitations of the will which preceded the power of appointment. This case, therefore, and especially as arising upon a disposition by deed, very satisfactorily confirms the class of authorities stated at large in the former book, to shew that the Court will, if possible, construe the gift as a disposition of the reversion to take effect in the event upon which it will come into possession (*r*).

8. Several cases have occurred upon the construction of words importing an indefinite failure of issue, occurring subsequently to an express gift to children or other issue, and the principle of referential construction stated in the former work has in general prevailed (*s*).

Thus, to this class of cases may be referred *Walker* v. *Petchell* (*t*), where the testator devised realty and personalty in trust for S. W. for life, and after her decease in trust for *the child or children* of S. W. as she should by deed or will appoint, and, in default of such appointment, in trust for *all and every*

(*r*) Treat. Perp. 263. (*s*) Treat. Perp. 277—291.
(*t*) 1 C. B. Rep. 652.

the child and children of S. W., and their several and respective heirs, executors, administrators, and assigns for ever; but in case S. W. should die "*without leaving lawful issue* as aforesaid," then over. It was contended, on one side, that the devise-over was to take effect on an indefinite failure of issue, and was, therefore, bad as too remote. But the Court held that the testator by the word "issue" meant "children," and that the limitation-over depended on S. W. dying without leaving children. In this case we observe that the construction adopted was assisted by the words "as aforesaid," but there can be little doubt that the conclusion would have been the same even without those words. This case may, perhaps, be considered to supply matter for another proposition, in addition to those stated upon this subject in the former work. For, there may be ground to contend that the ultimate limitation upon failure of issue of S. W., was an executory devise of the legal fee; and, in that view of the case, it is an instance to shew that the referential construction applies although the issue previously named are the objects of a trust-limitation while the gift-over which contemplates a default of issue passes the legal estate (*u*).

This case of *Walker* v. *Petchell* indirectly furnishes authority upon another point suggested in the former book, viz., as to the effect of the word "leaving," when it occurs in a limitation-over after a prior gift to children. The question is, whether this word operates so as to render the gift to the

(*u*) The Judgment in *Walker* v. *Petchell* was, certainly, not one of the best efforts of the lamented Judge by whom it was delivered, (although the conclusion was, substantially, a sound one) as may be seen by referring to the ingenious and able strictures of the reporters in 1 C. B. Rep. 1005. Some of those strictures, however, are not accurate. Thus, objection is taken to the use of the word "remainder" (in the judgment) with reference to the ultimate limitation, on the ground that (as supposed in the note alluded to) it was an *executory* limitation. But, clearly, until the birth of a child of S. W., the gift upon failure of issue was, in the strictest sense, a remainder; it being an instance of a limitation with a double aspect. And, again, it is not to be treated as *clear*, that the ultimate limitation was a devise of the legal fee.

children liable to fail in the event of the parent not leaving a child living at his death, or whether, on the contrary, the word "leaving" is to be read in the sense of "having had." The case of *Walker* v. *Petchell*, as far as it goes, sanctions the view (*v*) that the word "leaving," in such a case, refers to a default of issue at the time of the death of the first taker; for Sir N. Tindal observed—"Before S. W. has any child, the remainder to the children, and the remainder to S. W., would seem to be contingent remainders." "After a child is born, the devise-over to S. W. in fee would then be an executory devise." Now, it is obvious that, upon the construction of "leaving" as meaning "having had," there would not, after the birth of a child, be any executory devise at all; and, therefore, the Court must be considered to have negatived that construction. But, as the learned Judge remarked that this consideration did not affect the determination of the case before the Court, we are, probably, not at liberty to regard *Walker* v. *Petchell* as a decision of the point in question (*w*).

In *Goymour* v. *Pigge* (*x*), there was a devise to M. A. N. for life, and after her decease to the first child of M. A. N., and his or her heirs and assigns for ever, and if such child should die under twenty-one without leaving issue, then to the second child and his or her heirs and assigns, and in case such second child should die under twenty-one without leaving issue, then "to the third child of M. A. N., and so on to the fourth, fifth, and other children of M. A. N.;" "for in case of issue, it was the testator's will that such issue should inherit the aforesaid estates, and he thereby gave the same to him, or her, and to his or her heirs accordingly; but in case M. A. N. departed this life without leaving issue of her body, or, having issue, such issue should die under twenty-one without leaving issue, then the testator devised the estate to M. A. G. for life, with

(*v*) Treat. Perp. 282.

(*w*) What is above stated will shew that the observation (in the note of the reporters before alluded to) that "this point does not appear to have been considered," is incorrect.

(*x*) 7 Beav. 475.

remainder to N. G. in fee. M. A. N. died without having had any child, but having suffered a recovery, which rendered it necessary to determine whether, under the above limitations, she was tenant in tail, or tenant for life only. Lord Langdale, M. R., held that the words referring to the death of M. A. N. without leaving issue, must be understood to mean the "children," to whom, subject to the life estate, the property was previously devised; and that, consequently, M. A. N. took only a life estate, and the devise-over had effect. It is not clear what estates were limited under the gifts of the issue which preceded the gift-over. The learned Judge treated them as having "probably passed successive estates tail to the children;" but it had been contended in the argument that, from the want of words of limitation in the gift to the third, fourth, &c. children, such children would take only estates for life, so that their issue would be unprovided for, unless M. A. N., the mother, took an estate tail. To this argument, however, it was replied that the word "estate" which occurred in the devise, would carry the fee; and this view seems to have been sound: so that *Goymour* v. *Pigge* does not interfere with the 5th and 6th rules stated in the previous work (*y*), upon this subject.

The case of *Faulkner* v. *Daniel* (*z*) is another authority upon the present question. In that case estates in tail male had been devised (after estates for life to the testator's brother, D. M., and to J. M., who was the son of the former), to the first and other sons successively of J. M., and then to the second and every other son successively of D. M., with remainder in trust for the testator's right heirs; and then followed the clause: "and upon this last-mentioned contingency, *failing heirs male of my said brother, and of my said estate going to my right heirs more remote,* as aforesaid," then the testator charged a legacy upon the property. D. M. had no other issue male than J. M.; and J. M. died without issue male.

(*y*) Treat. Perp. 283. (*z*) 3 Hare, 199.

It was contended that as D. M. might have had other sons who might have died in the testator's lifetime, leaving issue male, which issue male would not take under the limitations, and yet might be living when there should be a failure of the issue who were the objects of the limitations, the event contemplated in the gift of the legacy (viz.—failure of heirs male of D. M.) might not happen until after the extinction of the estates under the limitations. But the Court intimated that the existence of such issue of D. M., as the objection supposed, would not have prevented the remainder to the testator's right heirs from taking effect.

Upon the same question, the case of *Doe* d. *Bills* v. *Hopkinson* (*a*) is deserving of notice, as conflicting apparently with the doctrine that where the gift to the issue or children of the first taker is *contingent*, words in the gift-over referring to a failure of the issue of the first taker shall be held to raise an estate tail in the parent in remainder expectant upon the contingent limitations to his issue or children. In this case, the gift was to "such child or children as he (the first devisee) shall happen to leave living, lawful issue, at the time of his decease, and to their, his, or her heirs;" and there was a gift-over on his dying "without lawful issue." In order to avoid the difficulty that the first taker might have children who should die in his lifetime, leaving issue, and yet the property go over and the issue lose the benefit of the devise, the Court held that the estate of each child would vest at its birth, and open to let in after-born children. But it should seem that this was a violent construction to put upon the words of the gift to the children, and perhaps the Court would have accomplished the same end more consistently with previous authorities by adhering to the natural import of the limitation (as including only children living at the decease of the first taker), and holding it to be a contingent remainder, with an estate tail in remainder in the parent, by force of the words introducing the gift-over.

(*a*) 5 Q. B. Rep. 223.

One other case remains to be mentioned in connexion with the referential construction, and supplies a rule which, though plain when examined, may yet perhaps escape attention. In the case of *Monypenny* v. *Dering* (*b*), there were various limitations in tail to the issue of P. M., (tenant for life) some of which were void for remoteness, "and in default of issue of the body of the said P. M., or in case of his not leaving any at his decease," over. The Court held that the gift-over could not be supported either by referring the words of the gift-over to a general failure of issue of P. M., or to a failure of the particular issue named in the preceding limitation, for in either case the effect would be, to raise an estate by way of remainder expectant on limitations that were void for remoteness, which expectant remainder must, therefore, be likewise void. "Whether (*c*) the word *issue* is to be construed to mean issue *general*, or *such issue* as had been previously designated, in either case the limitation-over will be void, as being an attempt to create estates which were to commence at too remote a period, namely, the *general failure of issue* of P. M., or the *failure of the particular issue named* by the testator. The limitation would not be set up by holding it to have given an *estate tail by implication* to P. M., for such an estate tail would be bad, as not being to commence till after the failure of the particular previous estates, which, we have already stated, are void for remoteness."

Lastly, if the doctrine (*cc*) of *Eno* v. *Eno* be sound, was not *Cole* v. *Sewell* (*d*) a case for the referential construction?

9. There are several important recent decisions upon the question (*dd*), when "issue" is to be read as a word of limitation, and when as a word of purchase, in limitations of real estate; which may be stated generally to have established this very sound rule: That when (to the gift to the issue of the first taker) words of *limitation* (as "their heirs," &c.) are superadded, and

(*b*) 16 M. & W. 418.
(*c*) 16 M. & W. 437.
(*cc*) Treat. Perp. 280. 384.
(*d*) *Supra*, p. 72.
(*dd*) 4 Dr. & War. 1.

when a mode of *distribution* between them, inconsistent with the course of succession under an estate tail, is prescribed, the issue take as *purchasers*, whether there be a *gift-over* on default of issue generally of the first taker, or not; but when words of limitation *only* are added, or when words of distribution *only* are added, to the gift to the issue, then the word "issue" is a word of limitation, and, in general (or except in cases of extreme doubt), it makes no difference in such instances whether there be or be not a gift-over upon default of issue generally of the first taker (*e*).

10. The question (*f*) as to the effect to be given by the Court of Chancery to an *executory trust* to take effect after an indefinite failure of issue, was glanced at in the case of *Eaton* v. *Barker* (*g*), but the circumstances rendered unnecessary any decision upon the point.

11. The doctrine that "heirs of the body" are words of limitation, unless there be strong evidence of intention to use them as *descriptio personarum* merely, has been recently applied in a very decided manner in the case of *Bartlett* v. *Green* (*h*), notwithstanding the following several peculiarities in the case which tended, in some measure, to support the contrary construction: first, the instrument which contained the limitations was a marriage-settlement; secondly, (the subject-matter being leasehold) the trust for the tenant for life, J. C., was expressed to be, that he should "*receive the rents for so many years of the term as should expire in his lifetime;*" and, thirdly, the

(*e*) *Tate* v. *Clarke*, 1 Beav. 100; *Crozier* v. *Crozier*, 3 D. & W. 353; *Greenwood* v. *Rothwell*, 6 Sc. N. R. 670; 6 Beav. 492; *Harrison* v. *Harrison*, 8 Sc. N. R. 862; *Slater* v. *Dangerfield*, 15 M. & W. 263; *Griffiths* v. *Evan*, 5 Beav. 241; *Montgomery* v. *Montgomery*, 3 J. & La. T. 47. See cases upon "heirs of the body," p. 80, *et seq.*, *post*. In *Lewis* v. *Puxley*, 16 M. & W. 733, (as to the words "eldest legitimate son)," the Court applied the doctrine that a passage in a subsequent part of the will, may be applied to confirm the view taken by the Court of the testator's intention in a preceding clause, though not of itself sufficient to establish the meaning of such former words.

(*f*) 1 Treat. Perp. 284.

(*g*) 2 Coll. 127. See *Stonor* v. *Curwen*, 5 Sim. 264.

(*h*) 13 Sim. 218.

trust for the "heirs of the body" was "to permit the heirs of the body of J. C. to receive the rents *for so many years of the term as should expire in the life or lives of him, her or them respectively* (*i*)." The Court, therefore, held that a limitation in trust to permit a person to receive the rents for so many years of the term as should expire in his lifetime, was equivalent to a limitation to that person for life; and also that the words apparently restricting the enjoyment of the "heirs" to the term of their respective lives, must, when that word is construed as a word of limitation, be rejected. What the effect of such a clause would be, supposing the "heirs" to take by purchase, seems not clear; but, in all probability, the construction will be, that the objects take absolute interests, and not interests for their lives merely.

The case of *Earl Verulam* v. *Bathurst* (*j*) is another authority tending in the same direction as *Bartlett* v. *Green*. Here, the doctrine that "heirs of the body" are words of limitation, was applied, notwithstanding that the interest of the tenant for life (being a *feme coverte*) was limited to her separate use; the Court observing that it was merely "a superadded modification that the husband shall not interfere with the property during her life." Again, the form of the trust-limitation for the tenant for life was, to permit her to *receive the rents* and dividends, and *the use of* the goods during her life, and the form of the trust-limitation for the "heirs" was a bequest of *the rents and profits*, and interest, *and the use of the* goods. And, again, there was a bequest-over in the event of the lady dying without leaving lawful issue *living at the time of her decease*. There is no doubt that, consistently with previous authorities, the Court could come to no other conclusion than that, notwithstanding the peculiarities in the limitations which

(*i*) Having regard to these expressions in the limitation, it seems that the opinion of Mr. Fearne (Posth. Works, p. 393) must be considered to be overruled. The decree in *Bartlett* v. *Green*, was appealed from; but it does not appear whether the appeal has been heard.

(*j*) 13 Sim. 374.

have been adverted to, the words were words of limitation and not of purchase, so that the whole interest vested in the first taker. It may be observed that the Court laid stress upon the circumstance that there was no variation in the phrase or description by which the property was given to the heirs of the body, and to the first taker for life—"no introduction of the principal, as if it were contradistinguished from the interest, on which distinction some of the cases turn."

12. The words "heirs" and "heirs of the body" will not be construed words of purchase to the heir, merely because the testator has added expressions shewing that he intended a succession of personal enjoyment by each individual from time to time answering the description of "heir;" as if he direct annual income to be paid to a person, and then say—"on his decease, the same shall be continued to his heir-at-law, and, failing the latter by death, so on in like manner as long as there shall be an heir." The words in question, notwithstanding a superadded direction of this kind, will be treated as mere words of limitation, and the whole disposition will be considered as a mere amplification of the notion of an absolute interest. This was the case of *Thompson* v. *Thompson* (*k*), which much resembles the case of *Snowball* v. *Procter* (*l*).

13. The word "descendants" is sometimes used in a will instead of "heirs" or "heirs of the body," and the question may arise, when such is the case, whether it is to be read as a word of purchase, or as a word of limitation. The case of *Dick* v. *Lacy* (*m*) furnishes an instance of the use of this expression, the gift being to the daughters of B. "and their descendants *per stirpes*, to hold to them, their heirs and assigns for ever." It was contended that the word "descendants" was to have the same effect as the word "issue," and that a tenancy in tail would be created in the real estate, and an absolute interest in the personal estate. But the Court held that the words "*per stirpes*" imported a distribution, and that

(*k*) 1 Coll. 388. (*l*) 2 Y. & C. (C. C.) 478.
(*m*) 8 Beav. 214.

this direction, coupled with the subsequent words referring to the "heirs and assigns" of the "descendants," rendered "descendants" a word of purchase, and it was not to be construed as a word of limitation. Certainly, as the learned Judge remarked, the case was attended with difficulty. But, the meaning attributed to the gift to the descendants "*per stirpes*," as importing a *distribution* of some sort or another, seems to be sound, and this construction being established, the effect of adding words of limitation to the gift to the class who were thus to take distributively, was to bring the case within the range of authority which determines that gifts to issue with words of distribution and limitation superadded make the issue purchasers. It should be added that the subject-matter upon which the question in *Dick* v. *Lacy* was decided, was personal estate only, although the terms of the gift purported to include also realty. It does not appear, however, that any different construction could have been adopted even as respects real estate.

14. That "heirs of the body" will yield to a clear indication of intention to use the words in a definite sense as descriptive of a particular class of descendants, and not of all descendants of the body (*n*), has been shewn in the recent case of *Doe* d. *Woodall* v. *Woodall* (*o*). In that case there was a devise to four grandchildren for their respective lives, with remainders to their sons successively in tail, with remainder to their daughters as tenants in common in tail, with cross remainders between them in tail, and a clause followed that in case either of the grandchildren should die leaving no issue behind him, then the premises should go to the survivor of them, *and the heirs of his or her body* lawfully to be begotten, *in manner aforesaid.* It was contended on one side that this clause gave the survivor an estate tail, while, on the other, it was said that the words "heirs of his body" were found in connexion with words going before and coming after which

(*n*) Treat. Perp. 305, *et seq.* (*o*) 3 C. B. Rep. 349.

shewed them to be mere words of reference, giving remainders to the sons and daughters of the survivor as purchasers. The judgment of the Court of C. B., delivered by Coltman J., is very satisfactory in favor of the construction that the grandchild taking under the clause in question should have an estate for life only, with remainders in tail to his sons and daughters. The learned Judge observed:—"The words 'in manner aforesaid,' are necessarily connected, by grammatical construction, with the words 'shall go and remain,' and with the intermediate words 'to the survivor, and the heirs of his or her body lawfully begotten as aforesaid.' The words 'in manner aforesaid,' taken in this connexion, are an express reference to some manner of going and remaining before mentioned, by which an estate could go and remain to a grandchild and his or her heirs lawfully to be begotten; and there is no such manner of going and remaining in any preceding part of the will, except the first clause, which gives estates to the grandchildren for life, and to their sons and daughters in tail, which, though not, in words, a devise to the heirs of the bodies of the sons and daughters, is a devise which may not improperly be described as one to the heirs of the bodies of the sons and daughters, inasmuch as those who would take under it are the same persons, and would take in the same order of succession, and for the same extent of interest."

15. The doctrine (*p*) that when a devise-over is made to take effect on the death of a prior devisee without *heirs*, the limitation will be construed as depending upon a failure of *heirs of the body*, and not of heirs general, whenever the ulterior devisee would be an heir general of the first devisee, was applied in the cases of *Simpson* v. *Ashworth* (*q*), and *Harris* v. *Davis* (*r*).

16. In reference to the change of "heirs" into "heirs of the body," a point arose of the first impression in the case of

(*p*) Treat. Perp. 311. (*q*) 6 Beav. 412.
(*r*) 1 Coll. 421.

Harris v. *Davis* (*s*). In that case there was a devise to ten persons and their heirs as tenants in common, with a gift upon failure of heirs of any of them to the surviving devisees. Nine of the ten were related to each other, but one was not related to the other nine, and, one of the nine having died without issue, the question arose, whether, as one of the individuals of the class of devisees in which the deceased person was included, was not capable of being heir to the others, the word "heirs" could be considered to mean "heirs of the body," on the ground of the consanguinity of some of the devisees-over to each other and to the deceased. The Court held, from the relationship between the nine, that by the words "their lawful heirs," the testator meant the "heirs of their bodies." The ground upon which this construction was pressed upon the Court, was, that one individual only of the whole class was a stranger, and that the gift-over, in default of an heir, was to the surviving *devisees* (in the plural number), *one* of whom, at least, must be capable of inheriting from the other members of the class. But it does not appear necessary to rely upon these special grounds. The question is merely, what is the testator's meaning; and it appears sufficient to prove his intention to speak of *issue* only, if *any* of the devisees-over are related to the prior devisee. It would be an objectionable theory to make the interpretation of the word "heirs" shift or vary, according as the *number* of relatives comprised in the gift-over is great or small, or according as they form the majority or minority.

17. It was remarked in the former work (*t*), that the inclination of law is in favor of the construction of a restricted failure of issue in limitations of chattels. The recent cases fully sustain this general doctrine. But still the Courts are indisposed to deviate, upon *slight grounds*, from the ordinary construction of words referring to a failure of issue, as meaning a default of issue indefinitely. This is strongly manifested in *Caulfield* v.

(*s*) 1 Coll. 421. (*t*) Treat. Perp. 325.

Maguire (*u*), where, after a gift of a sum of money to A. C., *for her separate use*, a clause was added that if she should die without issue, *by her then husband or any other she might thereafter take*, the money should go to other persons; and this gift-over the Court held invalid, refusing to say that the circumstance of the issue being spoken of in connexion with the parent, necessarily shewed that *children* only were meant. And it may be added, that this construction was adopted, notwithstanding that the word "issue" had been interpreted by the testator himself, in another gift in the same will, as synonymous with "children."

18. The difference in the meaning and force of the word "leaving," in a gift-over of *personal* estate and in a gift-over of *real* estate respectively, upon the first taker dying without *leaving* issue (*v*), was acted on in the case of *Mansell* v. *Grove* (*w*), where, in reference to a bequest of personalty, the failure of issue referred to was held to be restricted to the death of the first taker by force of the word "leaving."

19. The case just now referred to also supports the proposition (*x*) that the restrictive force of "leaving" is not negatived by the circumstance of the prior gift being such as would pass an estate tail in realty.

20. The rule (*y*) that a gift-over on the death of a legatee *without children*, is, even where it passes personal estate, to be read as a gift on a general failure of issue, and therefore invalid, is recognized in *Yearwood* v. *Yearwood* (*z*); and the same doctrine is to be collected from *Abram* v. *Ward* (*a*).

21. The doctrine that, in a gift of personal estate upon the death of one of several legatees without issue to the *survivor*, the reference to survivorship interprets the failure of issue to mean a failure of issue at the time of the death of the legatee (*b*), has been distinctly upheld in the recent case of *Turner* v.

(*u*) 2 Jo. & La. T. 176.
(*v*) Treat. Perp. 326.
(*w*) 2 Y. & C., (C. C.) 485.
(*x*) Treat. Perp. 328.
(*y*) Treat. Perp. 329.
(*z*) 9 Beav. 276.
(*a*) 6 Hare, 165.
(*b*) Treat. Perp. 337.

Frampton (*c*), although the learned Judge (Sir. J. L. Knight Bruce, V. C.) observed—"But though such is my impression, I think the case one of considerable difficulty." It should be added that the Court placed the question upon the same ground which has been taken in former cases, viz., the meaning and effect of the word "survivor," which, if construed to mean "other," and not in its ordinary and correct sense, the Court considered would not have had the effect of restricting the failure of issue, nor, consequently, of preserving the bequest-over from objection on the score of remoteness. The Court, however, would not depart from the correct and simple sense of the word. The same question occurred in *Ranelagh* v. *Ranelagh* (*d*), which had been before the Court on a previous occasion (*e*); and, although Lord *Langdale*, M. R., disposed of the case more upon the consideration that it had been, in effect, decided by Sir *J. Leach* and Lord *Brougham* on the former hearing, than upon independent grounds of his own, yet it is, probably, not difficult to collect from the report of his Lordship's observations, a readiness to concur in the doctrine that a gift of personalty to "survivors" controls and cuts down the failure of the issue of the prior legatee to a failure at the time of his death.

22. That in putting an interpretation upon the testator's words in the class of cases now under consideration, and drawing inferences of intention therefrom, the Court will compare and contrast the language in the particular gift with that which the testator has used in other kindred dispositions appearing in the will (*f*), may be seen by referring to the before cited cases of *Doe* d. *Woodall* v. *Woodall* (*g*) and *Lewis* v. *Puxley* (*gg*).

23. The doctrine that the words "if any," or "if there be any issue," appearing in or prefacing a gift to issue, which precedes a gift-over on failure of issue, is not sufficient to

(*c*) 2 Coll. 331.
(*d*) 4 Beav. 419.
(*e*) See Treat. Perp. 342.
(*f*) Treat. Perp. 361, and the note (*l*).
(*g*) 3 C. B. Rep. 349, (see the judgment).
(*gg*) 16 M. & W. 733.

support the construction of a restricted failure of issue upon the terms of the gift-over (*h*), is, perhaps, somewhat shaken (though not avowedly) by *Robinson* v. *Hunt* (*i*), *Taylor* v. *Beverley* (*j*), and *Goymour* v. *Pigge* (*k*).

24. In addition to the various instances given in the former book of cases in which the clause referring to failure of issue may be restrained, in a bequest of personal estate, to mean a failure of issue at the death of the party, may be mentioned the case of which *Turner* v. *Frampton* (*l*) (in one view of it) furnishes an example. If the gift, instead of providing for death without issue in the ordinary terms, is worded,—"if he shall die *and* without issue," the interposition of the word "and" appears very reasonably to affect the construction, and to shew, with tolerable clearness, that the testator meant a default of issue coincident with the death of the party. And as all these rules are directed to the single question of what was the testator's intention, we have only to be satisfied that the language expresses an intention to the effect suggested, and the interpretation of a restricted failure of issue will immediately follow. With Sir J. L. Knight Bruce, V. C., therefore, in the case just mentioned, it may be very fairly held that "that form of expression favors the notion, that the time of the death of the party to whom the passage refers, was considered by the testator as the time at which the existence or non-existence of issue would be material" (*m*).

25. The rule (*n*) that a gift of personal estate to several persons successively, and the heirs of their respective bodies, can operate once only, inasmuch as, after it has taken effect in favor of one of the objects, it becomes a limitation depending on an indefinite failure of issue, and is therefore void, is forcibly illustrated by the case of *Potts* v. *Potts* (*o*); for the whole effort of the Court in that case was to find out whether,

(*h*) Treat. Perp. 364.
(*i*) 4 Beav. 450.
(*j*) 1 Coll. 108.
(*k*) 7 Beav. 475.
(*l*) 2 Coll. 331.
(*m*) 2 Coll. 335.
(*n*) Treat. Perp. 367.
(*o*) 3 Jo. & La. T. 353.

according to the true construction, it could not be held that an elder son, who had died in the lifetime of the tenant for life, was not an intended object of the gift, in which view the second son (who survived the tenant for life) would have the absolute right to the property as first taker. The correct notion concerning gifts of this description, where the objects are not *in esse* and ascertained, and there is a limitation-over in default of issue, is, that they are limitations in the alternative, or with a double aspect, so that the latter does not take effect after or upon the determination of the former, but in lieu and upon the failure of it.

26. The question (*p*) whether the circumstance of the person (an indefinite failure of whose issue is contemplated in a gift) dying in the testator's lifetime, renders the gift valid, is comprehended in the larger and more general inquiry upon that subject already instituted (*q*); and the result of that inquiry is, to confirm the suggestion in the previous work, that, in the case supposed, the limitation is valid.

27. There is a case of *Milne* v. *Parker*, decided (as the writer believes) in the year 1848, by Sir James Wigram, V. C., (but not reported upon this point) which recognized the rule (*r*), that the words "after his decease," or the like, referring to the former taker, in a gift-over on failure of his issue, has the effect, in limitations of personalty, of restricting the clause to mean a failure of issue at the time of the death of the first taker.

28. Several recent cases have enforced the doctrine (*s*) that where, under a gift of personal estate to "issue" of a prior taker, the issue take as purchasers, words in the gift-over referring generally to a default of issue of the first taker, are to be read as importing a default or failure of the particular issue entitled under the preceding gift, and not issue generally, by which construction the gift-over is validated, and will have effect on failure of the objects of the preceding limitation.

(*p*) Treat. Perp. 371.
(*q*) Vide *supra*, pp. 27—65.
(*r*) Treat. Perp. 344.
(*s*) Treat. Perp. 373.

Such were the cases of *Robinson* v. *Hunt* (*t*), *Taylor* v. *Beverley* (*u*), and *Farrant v. Nichols* (*v*). Other cases referring to gifts of real estate, have been already (*w*) noticed upon this point.

There is one case, indeed, in which the referential construction was not adopted, but the gift-over was held void as depending upon an indefinite failure of issue; and, perhaps, the grounds upon which that construction was adopted are not perfectly satisfactory. The case alluded to is *Evans* v. *Jones* (*x*), where there was a gift to the testator's brother and his three sisters two of whom were married, for their respective lives, "and after the decease of either of them, then as to the share or shares of them so dying, to the issue of the body or bodies of him, her, or them so dying, begotten or to be begotten by their present husbands, share and share alike, for ever, and as to the share or shares of my said brother, or either of my said three sisters, dying without issue lawfully begotten, then to the issue of the body or bodies of such other sister or sisters, share and share alike." The brother died without having had issue, and the question was, whether his share passed to the issue of the sisters under the gift-over, or fell into the general residue. The Court held that it fell into the residue. After remarking upon the peculiar character of the will as rendering it dangerous to depart without manifest necessity from the correct and proper interpretation of the phraseology which "by choice or chance" the testator had used, the learned Judge proceeded to say:—"When I observe the exclusion, from the gift that I have been considering, of Jane Morgan's issue by any other husband than Thomas Morgan, and of Ann Thomas's issue by any other husband than John Thomas, I find myself obliged to say, that the words 'dying without issue lawfully begotten,' and the words 'so dying as aforesaid without issue,' must be read, not as

(*t*) 4 Beav. 450.
(*u*) 1 Coll. 109, 115.
(*v*) 9 Beav. 327.
(*w*) Vide *supra*, pp. 73—78.
(*x*) 2 Coll. 516.

qualified by the terms of the preceding gift to the issue of the testator's brother and sisters, but as pointing to a general failure of issue, whensoever happening, according to the general and ordinary (though, I agree, not the necessary or universal) meaning of the phrase 'dying without issue,' and according to that general and ordinary interpretation of the expression 'lawfully begotten,' which makes it equivalent to 'begotten or to be begotten,' which treats it as referring to legitimacy, and not to the time of geniture."

Having regard, however, to the authorities which have applied, under such various circumstances, the principle of the referential construction, it may, perhaps, be doubted whether the fact of the intermediate gift embracing issue of the two married sisters by their present husbands only, was sufficient to negative the construction that, when the testator referred, in the gift-over, to a default of issue of the brother and sisters, he meant a failure of the particular issue who were objects of the intermediate gift, *i. e.*, as to the two married sisters, a failure of their issue by their present husbands, and as to the brother and the other sister, a failure of the specified issue irrespectively of any distinction of that kind. However, as the learned Vice Chancellor remarked, the case was "not without difficulty." (*y*).

Supposing, however, that *Evans* v. *Jones* was not a case for the application of the referential construction, it may be doubted whether the proper alternative was not, to hold that the deceased brother took *the absolute interest* upon the principle that, as the gift-over would, upon that hypothesis, refer to an indefinite failure of issue, the brother would, in the case of realty, have taken under such a gift an estate tail by way of remainder, expectant upon the intermediate limitation to the issue (*z*). Certainly, this was the doctrine of *Franks* v. *Price* (*a*), between which and *Evans* v. *Jones* the only

(*y*) The case of *Leeming* v. *Sherratt*, 2 Hare, 14, Treat. Perp. 350, seems not to have been cited in the argument in *Evans* v. *Jones*.

(*z*) Treat. Perp. 285, 378, 379.

(*a*) 3 Beav. 182.

material distinction is, that the former was the case of a conjoint gift of realty and personalty, whereas the latter was a case of personalty singly. But, having regard to the principle upon which the doctrine alluded to is grounded, this distinction appears not to account sufficiently for the difference in the conclusions of the two cases.

29. The rule (*b*) that when issue is a word of limitation in the first gift, a limitation-over "in default of such issue," refers, even in the case of personal estate, to issue indefinitely of the first taker, and not to a failure of issue at the time of his death; so that the ulterior gift is void as depending on an indefinite failure of issue; is exemplified in the cases of *Hedges* v. *Harpur* (*c*) and *Jordan* v. *Lowe* (*cc*).

30. Recent cases appear to throw doubt upon the doctrine (*d*), that "issue" is a word of limitation in gifts of personal estate when accompanied with words of *distribution*. The contrary seems to have been the view acted on in the case of *Robinson* v. *Hunt* (*e*), where an annuity was given to C. and S., to be equally divided between them during their joint lives, and to the survivor of them; "and if S. should have children lawfully begotten, then the annuity to be equally divided between them," but if only one child, then that child to have it; "but if S. should die without issue lawfully begotten, then over." Lord Langdale, M. R., held that the children of S. were entitled to interests in perpetuity, in equal shares, as tenants in common, in the annuity. The same doctrine was recognized in *Taylor* v. *Beverley* (*f*), and *Evans* v. *Jones* (*g*). Indeed, there seems considerable ground for holding that, in the case of personal estate, "issue" ought to receive the construction of a word of purchase, when a division or distribution amongst the issue is plainly intended and directed by the testator.

(*b*) Treat. Perp. 382, 391, 395.
(*c*) 9 Beav. 479.
(*cc*) 6 Beav. 350.
(*d*) Treat. Perp. 384.
(*e*) 4 Beav. 450.
(*f*) 1 Coll. 108.
(*g*) 2 Coll. 516.

31. That "children" is, in general, a word of limitation, even in a gift of leasehold or other personal property (*h*), is affirmed by the case of *Snowball* v. *Procter* (*i*), where the direction in the bequest was, that the profits of a leasehold colliery should yearly be equally divided amongst the testator's wife and children *and their children after them*, respectively; and the Court, after remarking that neither of the children married in the testator's lifetime, said it was clear upon the whole will that the words "their children after them respectively," were words of limitation and not of purchase. It may be observed that it had been argued, upon the strength of the words "and their children after them respectively," that a *personal benefit* was intended to each successive legatee, which was inconsistent with the construction that an absolute interest was given to the children; but there was very little weight in this argument, for the indication of intention in favor of the remote issue was no greater than may be said to exist in every case where property is directed to be enjoyed by issue in succession, and as "children" is an apt word of limitation, that indication of intention was clearly not sufficient to reduce the effect of it; but rather, on the contrary, tended to support the same construction.

32. The rule (*j*) that when the expression "issue" or "heirs of the body," is a word of limitation regarded independently of the gift-over, provision by that gift for the event of failure of issue of the first taker *at the time of his decease*, does not interfere with the construction of the language of the previous limitation, was adhered to in *Earl Verulam* v. *Bathurst* (*k*), where the Court held that if there should be no issue or heirs of the body living at the time of the decease of the first taker, then the property would go over, notwithstanding that, in the first instance, it would be an absolute interest (the subject-matter being personalty and leaseholds) in the first taker.

(*h*) Treat. Perp. 388.
(*i*) 2 Y. & C., (C. C.) 478.
(*j*) Treat. Perp. 392.
(*k*) 13 Sim. 388.

The same rule was followed in *Mansell* v. *Grove* (*l*), where after a gift of personal estate to E. M. P. "for life, and his heirs male after him," the will provided that "if he should not leave any son," then the property should go to W. M. P. E. M. P. died, having had one son, who died in his lifetime but after the decease of the testator. It was contended for the personal representative of E. M. P. that the word "son" in the limitation-over, was synonymous with "heirs male" in the preceding gift, and that upon that view the gift-over to W. M. P. would be void for remoteness. But the Court held that (whether "son" was to be read strictly, or as meaning male issue) the words "not *leave*" in the gift-over imported the not leaving issue at the death of the former taker, and that, consequently, the gift to W. M. P. took effect. This case, then, indirectly supports the doctrine suggested in the former work (*m*), that "leave" and "leaving" in a gift-over of personalty, do not necessarily impart to the word "issue," in the preceding limitation, the construction of a word of purchase.

33. That the words "if any" or "if there be any issue," or the like, appearing in or preceding the gift to the issue, are not wholly inoperative to render "issue" a word of purchase (*n*), may be collected from *Robinson* v. *Hunt* (*o*), *Taylor* v. *Beverley* (*p*), *Goymour* v. *Pigge* (*q*), and *Montgomery* v. *Montgomery* (*qq*).

34. The case of *Jordan* v. *Lowe* (*r*) suggests the rule that in a bequest of personal property it is not sufficient to give "issue" the force of a word of purchase, that the issue are to take by the gift *successively*, or "according to their respective seniorities." The question in such a case (as in other cases) must be, in what sense does the testator use the word "issue?" If he mean by it to refer to issue indefinitely,—if the import of the word be to carry the property to every person coming within the description of "issue,"—then it seems clear that

(*l*) 2 Y. & C., (C. C.) 484.
(*m*) Treat. Perp. 390.
(*n*) Treat. Perp. 391, 392.
(*o*) 4 Beav. 450.
(*p*) 1 Coll. 108.
(*q*) 7 Beav. 475.
(*qq*) 3 J. & La. T. 47.
(*r*) 6 Beav. 350.

the addition of a clause directing them to take by seniority and successively is unimportant, and the clause cannot interfere with the effect of "issue" as a word of limitation. But when there are other words which signify that the testator pointed to *children* only, then it should seem that the clause directing enjoyment by the objects in succession, ought to have weight in the construction of the gift as making the "issue" purchasers. Now, in *Jordan* v. *Lowe*, the words "lawfully begotten" occurred; and this is an expression which slightly favors the notion that the testator intended to speak of children. It is true, as was remarked by the Court in the judgment in *Evans* v. *Jones*, it is an expression ordinarily to be understood as "referring to legitimacy, and not to the time of geniture;" but, when found in connexion with words referring to individual *ages*, there certainly does seem a natural *primâ facie* meaning in the whole clause in favor of *children* being the class of objects designated. Under such circumstances the precise case seems to exist, where the flexibility of the word "issue" may enable the Court to give effect to those accompanying indications of intention which have been adverted to, and which, it might be admitted, would not prevail against the technical force of "heirs of the body." This latter was the expression which occurred in *Jones* v. *Morgan* (*s*); which circumstance, coupled with the important fact that that case related to a devise of *real* estate, seems to render *Jones* v. *Morgan* not applicable as an authority to support *Jordan* v. *Lowe*. When, to these considerations it is added that the gift-over was here made "upon default of *such* issue" (*t*), the doubts which arise upon this decision may be found not insurmountable.

35. The question (*u*) whether when "heirs of the body" are read as words of *purchase*, in a gift of leaseholds or other personalty, the expression is applicable to any other than the

(*s*) 1 Bro. C. C. 205.

(*t*) See, as to this, Treat. Perp. 390, 391.

(*u*) Treat. Perp. 281, 373—378, 406. See also Fearne, P. W. 393.

person answering the complete description of heir at the decease of the tenant for life (that is, whether *issue* or *children* would take as a class), or whether the person who takes under the gift, must be heir of the body in strictness, might have called for decision in *Bartlett* v. *Green* (*v*), and *Earl Verulam* v. *Bathurst* (*w*), and the question was argued there; but the Court holding the words in the settlement and will respectively (to which those cases related) to be words of limitation, it became unnecessary in either case to decide that particular point. The kindred question (*x*) whether, when "issue" is construed as a word of purchase, the objects entitled under the gift are the *children* of the first taker, or his issue or descendants of *every degree* living at the time (whatever it be) when the objects are to be ascertained, was decided in *Evans* v. *Jones* (*y*), where, under a bequest to "the issue of the body or bodies of A. B. C. and D., begotten or to be begotten by their present husbands, share and share alike for ever," it was held by Sir J. L. Knight Bruce, V. C., that not only children but more remote descendants living at the time of distribution took the share of the parent or ancestor, as tenants in common equally *per capita* (*z*). In *Crozier* v. *Crozier* (*a*) children only were considered to be included, but the expressions were clear to that effect.

36. That "heirs" may be reduced to signify "heirs of the body," for the purposes of a gift of *personal* estate (*b*), may be seen by referring to *Harris* v. *Davis* (*c*).

37. As yet there has appeared but little judicial interpretation of the important clause in the late statute of Wills, altering the construction of words referring to a failure of issue. On this subject the case *In re O'Bierne* (*d*) decides that an *intention* in the testator to limit an *estate tail* is not to be inferred from the

(*v*) 13 Sim. 218. See p. 222.
(*w*) 13 Sim. 374. See p. 385.
(*x*) Treat. Perp. 281, 373—378.
(*y*) 2 Coll. 516.
(*z*) But see *Slater* v. *Dangerfield*, 15 M. & W. 263.
(*a*) 3 Dr. & War. 373.
(*b*) Treat. Perp. 405.
(*c*) 1 Coll. 416.
(*d*) 1 Jo. & La. T. 352.

use of words in the gift-over which before the act would have imported an indefinite failure of issue, and, consequently, that to bring a devise within the *exception* of cases where an estate tail is previously limited, it must be an estate tail raised by the preceding gifts, without making use of any implication arising from the words introducing the gift-over.

38. Apart from any question of remoteness, it may be added, as bearing upon the general subject of the present Chapter, that in *Farrant* v. *Nichols* (*e*), *Hedges* v. *Harpur* (*f*), *Minter* v. *Wraith* (*g*), and *Head* v. *Randall* (*h*), the word *issue* was restricted to the sense of *children*. With reference to the converse case, of "children" being used in the sense of "issue," the authorities may be referred to which have been already cited to shew that children is an apt word of limitation.

39. Lastly, it must be observed that no variation will be made in the construction of the class of gifts which have been here brought under consideration, on account of any objection of remoteness which might follow upon the ordinary and regular construction of the limitation apart from the Rule against Perpetuities. The question, what is the testator's meaning, cannot, when that meaning is sufficiently expressed, depend upon the point whether, when discovered, it can legally be effectuated (*i*).

(*e*) 9 Beav. 327.
(*f*) 9 Beav. 479.
(*g*) 13 Sim. 52.
(*h*) 2 Y. & C. (C. C.) 231.
(*i*) See the judgment in *Boughton* v. *James*, 1 Coll. 43; and the opinion of Mr. Justice *Patteson*, in *Dungannon* v. *Smith*, 12 Cl. & Fin. 588. The statement to the contrary in Smith's Original view of executory interests, p. 263, seems clearly insupportable.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS REMAINDERS AND LIMITATIONS IN THE NATURE OF REMAINDERS, AND THEREIN OF THE DOCTRINE OF CY-PRES.

THE doctrine which the writer took upon himself to lay down in the former book under this head was, that the laws against remoteness are applicable to limitations by way of contingent remainder at common law. This point is one of the most important that can occupy the attention of the real property lawyer, and it is satisfactory that so much consideration has been given to it by the Profession during the last five years, for this cannot but facilitate the ultimate settlement of the question whenever it comes fairly and fully before Courts of Justice. At present the dispute, so far as respects judicial decision, is precisely where it was when the writer last offered his views upon the subject to the notice of the Profession. In other respects there is reason to believe that the position of the discussion is not the same; for the concurrence of many has been gradually yielded to the view above stated, to whom at first it may have seemed a strange or novel suggestion.

The observations made upon this subject in the former book were such only as appeared to be called for in justification of the doctrine stated, and before the writer was aware of any direct existing opposition to it. It will now be his aim to supply such further considerations as may complete and mature the body of argument sustaining the proposition under review.

In determining the question whether contingent remainders can, in *any* case, be said to fall within the Rule against Perpetuities, it should be borne in mind that there is a very great

distinction between the question thus stated and the question whether a limitation is, in *every* case, void for remoteness as a remainder, where it would fail on that ground as an executory interest. It is probable that much of the obscurity in which this point has been involved, arises from inattention or want of due attention to the distinction here referred to. The rule is conceived to be this:—Whenever, by the necessary conditions of a gift—those which are inherent in the nature of the limitation—such limitation must absolutely vest or (if not vest, then) entirely fail at a period which is within the allowed limits of remoteness, that limitation, whatever be the terms, and whoever the intended objects of it, is not within either the reason or the operation of the Rule against Perpetuities. Now, there are certain conditions inherent in the nature or constitution of that class of limitations which the law designates *remainders;* inherent, that is, by reason of a positive necessity to conform to those conditions imposed by fundamental rules of law, which being neglected, the gift is not a remainder, but something else. Of these conditions, the most prominent is that which declares that the limitation, in order to take effect at all, must do so at or before a certain time or the happening of a certain event; and that event is the expiration or determination of "the particular estate." The thing ceases to be a remainder if it do not in fact then vest; and it is not at any time a *remainder*, even in legal contemplation, unless, from the first, there be a *possibility* that it may then vest. Now, (the question being whether, in any given case, the remainder is or may be too remote) it may sometimes be found that, as the result of this necessary and inflexible condition of its *status* as a remainder, there is no possibility of its vesting or taking effect at all in that character at any time or upon any event beyond the limits of Perpetuities, simply because it is certain that the particular estate will not determine at any time beyond those limits. As a remainder, its vesting or its failure will have been ascertained, as an actual fact, before the time arrives when the character of a Perpetuity would first be considered to attach to the limita-

tion. The application of the doctrine of remoteness, it is clear from the very moment of the creation of the estate, is excluded. The supposed circumstances do not admit of any suggestion of remoteness, and the Rule against Perpetuities can have no connexion with the question of the validity and effect of the limitation: it is an entirely irrelevant topic. Then, proceeding further, let us observe, as necessarily following from this, that, although the contingency in the event upon which the remainder is limited, or the description of persons to whom it is limited, may be such as to render it quite uncertain whether the one will happen or the other be ascertained within lives in being and twenty-one years, yet this circumstance or this consideration does not in any manner interfere with it as a subsisting and operative gift. For, the Perpetuity rule requires only that the happening of the event or the ascertainment of the object specified in the limitation, should be such that, *if* the event happen or the object exist *at all*, it can by no possibility be deferred beyond lives in being and twenty-one years. This is certainty in the circumstances of the gift, the operation and effect of which is to secure certainty in the limitation itself. But this certainty in the *limitation* is secured equally, although in another manner, in the case of a *remainder* limited after a particular estate which will necessarily determine within the prescribed period. Here certainty in the circumstances, taken *per se*, is not material, because the nature of the *estate* guarantees the certainty. In the case of an executory limitation the rule says that its limits shall not be transgressed in the contingency contemplated by the gift: in the case of remainders of the *description now alluded to* the guarantee is afforded by the nature of the limitation itself, apart from which it is not material to inquire what may be the form, nature, or extent of the contemplated contingency.

The example by which the writer illustrated in his former work, the doctrine here stated more at large, was the case of a limitation to A. for life, and after his decease to all the children of B. who shall attain twenty-five, or other age greater than

twenty-one, or to all the children of an unborn child of A. It is clearly settled, that when property is thus limited to a class of persons by way of remainder, those members only of the class are entitled to take by the remainder, who have acquired vested interests at the time of the determination of the particular estate. In the case supposed, upon the attainment of twenty-five by any one child of B., or upon the birth of a grandson of A., the remainder forthwith vests in interest in that individual, but the interest is liable to open and let in any other child of B. attaining twenty-five, or grandchild of A. born, before the death of A., the tenant for life. But after the determination of A.'s life-estate, no child of B. attaining the specified age, nor any grandchild of A. coming *in esse*, is admitted to share the seisin which vested in possession upon the determination of the life-estate. The objects of the gift are those only who then possessed vested interests, and the vesting in possession which then takes place is final—not liable to be disturbed. If at A.'s death there be not any child of B. of the age of twenty-five, or not any grandchild of A. born, the remainder at once and for ever fails: but it thus fails, not because of any uncertainty as to whether the objects in question will be ascertained within lives in being and twenty-one years, but because the limitation was a remainder, and, as a remainder, cannot be permitted to subsist unvested after the determination of the particular estate (*a*).

It might be sufficient to leave with the example just taken, the position, that a remainder depending on a particular estate which must *necessarily determine* within the allowed limits of remoteness, is perfectly unexceptionable, whatever may be the remoteness of the contingency comprised in the

(*a*) A passage in the judgment in *Williams* v. *Teale*, 6 Hare, 251, and in the opinion of Parke, B., in *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 606, which refers to an example, the same with the first of those above observed upon (and states, that if the parent be living when the testator dies, the limitation-over to the children is void), must, it should seem, be understood as spoken of limitations which are not *remainders* limited of *real* estate.

limitation, regarded abstractedly from its own nature and character as a remainder. But it will serve to clear the subject generally of doubt, if we take note of some other forms of contingency of a similar description with that just examined. A limitation to A. for life, and after his death and the death of B. without issue, to C. in fee, is another instance, where the ulterior gift otherwise than as a remainder would be void, but, as a contingent remainder, is unquestionably good. So, again, a limitation after the death of A., tenant for life, to such of the family of B. as shall first be in holy orders, would be a valid remainder, although, as an executory limitation it would be invalid. For the purposes of illustration, we may refer to the late case of *Doe* d. *Winter* v. *Perratt* (*b*), where the testator, after certain limitations of life estates (*c*), gave the property "to the first male heir of the branch of my uncle Richard Chilcott's family;" which family, at the date of the will and of the testator's death, was represented by five females. Now, it being here entirely uncertain when a person would appear answering the description of "first male heir, &c." it is clear that, if the limitation had been made by way of executory devise, it must have been held void for remoteness: but since, in the character of a remainder, it would certainly fail, if not capable of vesting, at the expiration of the life estates, there was no possibility of objection to it as tending to a Perpetuity.

It is clear, then, upon the doctrines and illustrations which have been stated, that a limitation is not in *every* case void for remoteness as a remainder where it would fail on that ground as an executory interest. But it seems that, because undeniably a guarantee is afforded (in the very nature of a remainder) against undue remoteness in all cases where the

(*b*) 7 Scott, N. R. 1; 9 Cl. & Fin. 606.

(*c*) For the purposes of the argument, and with reference to the circumstances which happened, the prior limitations were treated as having created life interests only; and it is unnecessary to inquire whether, according to the true construction, one of those gifts would not have passed an estate tail.

particular estate is limited to a person *in esse*, there has been an undistinguishing adoption of the conclusion that a remainder cannot in *any* case be said to fall within the operation of the rule against Perpetuities. It seems to be considered by some utterly unsound to suggest even the possibility of a remainder being void for remoteness. Now, not anything could more be lamented by any one anxious for the honor of legal science, than an arbitrary or shortsighted determination of a question which affects the very foundation of our system of settlements of land. Inconvenient or unsound doctrines are sometimes met with in our law records, which a most proper and necessary deference to former authorities compels Judges, while they disapprove, yet to follow. But, in this case, an adherence to *principles* and long established theories which have not hitherto proved otherwise than useful, is alone called for. Let there be the most ample discussion of the meaning and spirit of those principles, and the most searching examination into the true genius of our law of settlement, and we may confidently hope that whatever is the proper result of that discussion and that examination will be adopted by those who may be called upon to decide the question.

It seems (*d*) that there are at least five different views entertained in the Profession upon the question in dispute, although the practical conclusions do not vary to quite the same extent (*e*).

(*d*) In order that the argument may not be incomplete and fragmentary, the writer has here embodied some parts of an essay upon this question, published by him in the year 1844, and entitled "Can Remainders be too remote?"

(*e*) The History of the discussion is shortly this:—In the early part of the year 1843, Sir Edward Sugden, the then Lord Chancellor of Ireland, expressed an extrajudicial opinion, in the course of his judgment upon the case of *Cole* v. *Sewell*, (2 Con. & Law, 344, 4 Dr. & War. 1) that remainders were not within the operation of the Rule against Perpetuities. In his treatise on Perpetuities, 408—417, published shortly afterwards, but before the report of *Cole* v. *Sewell*, the writer of these pages anticipated the question, in reference to an incidental expression of opinion on it by the Real Property Commissioners, with which he was unable

First, the opinion entertained (as it appears) by Sir Edward Sugden (and which, to the writer's knowledge, was, until recently, shared by practitioners of considerable standing and eminence) is, that since remainders must, by the very rules which govern their validity, vest at or before the determination of the particular estate, they cannot possibly, *qua* remainders, take effect in contravention either of the letter or the policy of the Rule against Perpetuities; and (as the writer endeavoured to shew in his former treatise) (*f*) this view necessarily presupposes that by the term "particular-estate" is meant a freehold interest originally limited to a person *in esse*, or where there are several such interests, that interest which is for the time being in possession; and that no freehold estate originally contingent as limited to an unborn party can, after it has become vested, and has taken effect in possession, form the particular estate to support an ulterior remainder.

to coincide; and, after argument and inquiry, arrived at a conclusion different from that which subsequently appeared under the sanction of the Irish Chancellor. He advanced, moreover, the concurring sentiments of Mr. Fearne, Mr. Preston, and Mr. Jarman, which, undoubtedly, are favorable to that view of the subject. (See these quoted in Treat. Perp. 412, 413). A few months after the publication of this work, the concluding portion of Mr. *Jarman's Treatise on Wills* was given to the Profession, which contained (Vol. 2, pp. 727—735), with especial reference to the observations of Sir Edward Sugden in *Cole* v. *Sewell*, an explicit adherence to the doctrine that remainders might be too remote. Very shortly afterwards, occasion was taken in an article of ability in a legal periodical (Jurist, Vol. 8, p. 22), to condemn the views of Mr. Jarman, and the writer, in support of a conclusion practically, although not in theory, resembling that of the Lord Chancellor of Ireland. And since, in the course of a paper in a quarterly publication (Law Mag. Vol. 31, p. 362), chiefly conspicuous for a humorous attempt at detraction from Mr. Fearne's well earned reputation, strictures have been passed upon Mr. Jarman's observations, as if they were directed to the decision in *Cole* v. *Sewell*, instead of (as was clearly the case) the general observations contained in the judgment. And lately the House of Lords has affirmed the decree in *Cole* v. *Sewell*, but without finding it necessary to determine the question, whether remainders can be too remote. The subject was, however, introduced into the argument, and, it is believed, excited some interest among the noble and learned body.

(*f*) P. 410.

As it has been suggested (*g*), that the writer was incorrect in his interpretation (*h*) of the language of the judgment in *Cole* v. *Sewell*, and that it was not, in truth, the view here referred to which the Chancellor of Ireland entertained, but some other, it may be well, before proceeding further, to note the terms in which the doctrine of that case is enunciated. By a settlement lands were limited to certain parties for life, with remainders to their sons successively in tail male, with remainder (after intervening limitations not material to be noticed) to their daughters as tenants in common in tail general, and then followed a limitation in case any of the tenants for life should "die without issue," and one question in the case was, whether this limitation upon failure of issue of the tenants for life was valid. The decision was in favor of the validity of the remainder; and if the writer may express an opinion upon it, he would say that that decision was perfectly correct. The first question raised was, whether the limitation upon failure of issue of the tenants for life was a springing use or a remainder, and this point was decided (as alone it could be decided consistently with the principle that no limitation shall be construed to be an executory use, which can by possibility take effect as a remainder) in favor of the construction that it was a *remainder*. Consequently, it was the case of a *remainder* expectant on *estates tail* but dependent on a contingency which possibly *might* not happen *until after the determination* of the estates tail. The previous limitations did not exhaust the whole line of the issue of the tenants for life, whereas the remainder was, in terms, only to take effect in case of their dying without issue generally; and, therefore (*hh*), as the learned Judge himself expressed it, "the gift-over was beyond the natural termination of the preceding limitations." But, as the gift-over was a remainder, there was necessarily a condition implied in it, that if, at the determination of the preceding limitations, there were issue of the tenants for life who did not

(*g*) 8 Jurist, p. 283.

(*h*) See Essay entitled "Can remainders be too remote?" p. 3.

(*hh*) But see p. 108, *post*.

take estates under those preceding limitations (*e. g.*, issue female of sons), the contingency would not have happened, upon which the remainder was to take effect, and on that account, as the preceding estates would be already determined, the remainder would be destroyed. Now, here it is obvious that, while the limitation subsisted as a remainder, it was liable *to be defeated* by the recovery of previous tenants in tail; it would not at any period be a remainder in an indestructible state; it would not be capable of arising at any time after it had ceased to be destructible. It was, consequently, within the well known doctrine that an estate destructible by tenants in tail, cannot be too remote. Just as an *executory limitation*, so given upon a remote contingency, as in terms to be *capable* of arising *after* the expiration of the period during which it is destructible,—that is, after the determination of the estates tail,—becomes void, under the Rule against Perpetuities, after the determination of the estates tail (if it has not then taken effect)—so this remainder, if not capable of vesting upon the determination of the estates tail, would then become void, as a necessary consequence of its *status* and constitution as a remainder.

This, as the writer conceives, was the true character of the limitations in *Cole* v. *Sewell*, and it is satisfactory that, so interpreting them, the circumstance of the limitation in question being *a remainder* was in fact very material. It would account for the learned Judge bringing prominently forward and relying upon the common law rule, that remainders must vest at the determination of the particular estate, because, without adverting to that rule, it could not be shewn that the limitation would not at any time exist as an indestructible estate depending on a contingency too remote.

From some passages in the judgment in which reference is made to the doctrine of the non-remoteness of limitations postponed to estates tail, it may be conjectured that the Lord Chancellor, when speaking of the situation of remainders with respect to the Rule against Perpetuities, considered him-

self to be referring to remainders dependent on estates tail, of which the limitation in *Cole* v. *Sewell* was an instance. But, be this as it may, the expressions attributed to his Lordship in the Report are of wider application, and hence it is that, as they extend beyond the immediate occasion, we are at liberty to regard the opinion concerning remainders in *other* cases an extrajudicial one, which, in a case immediately affected by it, would have received from the learned Judge an independent examination.

" As to the question of remoteness," said the Lord Chancellor, " at this time of day I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to Perpetuity, which is a comparatively modern rule (I mean of recent introduction when speaking of the laws of this country) was not known, so that while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to Perpetuities, this has long ceased, and no question now ever arises with reference to remoteness, for if a limitation is to take effect as a springing, shifting, or secondary use not depending on an estate tail, and if it is so limited, that it may go beyond a life or lives in being and twenty-one years and a few months equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it

must take effect, if at all, upon the determination of the preceding estate. In the latter case the event may or may not happen, before or at the instant the preceding estate is determined, and the limitation will fail or not according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder."

The desire of every one to learn the views upon this point of so distinguished a real property lawyer as Sir Edward Sugden, is not easily gratified in reference to the passage thus reported. Three propositions undoubtedly are contained in it, but it seems difficult to follow the reasoning of them (which induces a question whether the report correctly represents what fell from the learned Judge). First, it is said that when contingent remainders were the only species of future estate known to the law, remoteness was an objection to a remainder, and the law endeavoured to avoid remote possibilities. Secondly, that this doctrine was superseded by the introduction of the Rule against Perpetuities. Thirdly, that this Rule avoids remote shifting limitations, but the objection of remoteness cannot now be sustained against a contingent remainder. But, it at once occurs to ask, how could the imposition upon shifting limitations of a restraint (against undue remoteness) operate to remove from contingent remainders the liability to be affected by that very same objection of remoteness which previously had rendered necessary the imposition of a like restraint upon *them?* And, especially, when the later restraint, as observed by the learned Judge, was actually a substitute for the earlier one?

The Lord Chancellor further remarked—" The remainder-over is in default of issue generally, but *it can only take effect* when and if there is a failure of issue male, that is *upon the regular determination of the previous estate;* there is no distinction in point of Perpetuity between the limitations: either can only take effect at the same period." " If the remainder-

over take effect at all, it must take effect immediately upon the natural determination of the preceding estates."

Now, after the passages which have been quoted, it is apprehended the doctrine put forth in *Cole* v. *Sewell* (as reported) may be correctly stated to be, that remainders, by reason of the rule of the common law which requires that they should vest at the determination of the particular estate, cannot, in any case, be too remote. It has been supposed (*i*) that the learned Judge grounded his opinion on the argument of the destructibility of the contingent remainder by a premature determination of the particular estate, but the language of the reported judgment (as the writer understands it) seems to exclude any attempt to put such an interpretation upon it.

This, then, is the first of the different views on the question now under consideration; and, accordingly, the grounds of it the writer will endeavour respectfully to investigate. But it will be convenient, before doing so, to dispose of the case of *Cole* v. *Sewell.*

The writer has already ventured to express his opinion that the decision in favor of the validity of the remainder in that case was sound, and the true grounds of it have been suggested. But another consideration attaches to the case which seems to shew that any contention upon the point of remoteness was wholly misplaced. It has been suggested in the preceding Chapter (*ii*), whether the remainder upon death "without issue," might not, by construction, have been read "in default of *such* issue," in conformity with the authorities establishing the referential construction in such cases. If so, the limitation was simply a remainder expectant on the failure of the particular issue who were objects of the intermediate limitations, and inheritable to the estates tail created thereby; and a question of remoteness was not any more pertinent under such circumstances than in the common case of a limitation by way of remainder made to take effect

(*i*) 8 Jurist, 283. (*ii*) Pages 72, 78.

upon failure of the objects of estates tail previously limited. It is, perhaps, not easy to explain how it happened that more attention was not given to this view of the case, for, so regarding it, discussions would have been excluded from its consideration, which, when contrasted with the true nature and constitution of the limitations, combine to render *Cole* v. *Sewell* a case of anomalies and paradoxes. For, to complete its curious history, there is yet another stage in its course to be adverted to. The decision went by appeal to the House of Lords; and the appeal has resulted (as might justly be expected) in affirming the decision of the Lord Chancellor of Ireland. The only report (*j*) which has appeared as yet of the opinions delivered by the Peers on this occasion is, probably, not a full and complete statement of all that fell from their lordships in giving judgment. Consequently, we may expect that the authorized report, when it appears, will prove more satisfactory than the existing report, in shewing the precise and particular grounds upon which the judgment of the House was intended to be rested. Certain it is, that those who anticipated a clear, consistent, and explicit statement of principles from the members of the Court of Appeal in the judgment upon *Cole* v. *Sewell*, hope yet to be gratified in that respect. There is, it may be feared, risk of misapprehension upon the important question here brought under the reader's notice, from the obscurity of some passages in the report of the opinions of those eminent persons in this case of *Cole* v. *Sewell*. The Lord Chancellor is represented as having (after stating the question to be whether the limitation upon the failure of issue of any of the three tenants for life was too remote) said,—"If, however, this limitation is a remainder, and may be barred, it is clear the objection cannot apply;" and then, after shewing that nothing prevented the limitation being a remainder in contingency, his lordship concluded—"It is, therefore, a contingent remainder, and may be barred." These passages are, doubtless, to be read as conveying nothing more than that the limitation (the validity

(*j*) 12 Jurist, 927.

of which was in question) was a destructible remainder, which, if not distroyed, would take effect or fail at the time of the determination of the preceding estates. In this view of them, they confirm the interpretation which, in a preceding page, is given of the decision of Sir E. Sugden in this case. But the extreme terseness of the sentences as reported exposes them to another construction, viz., that merely as *a remainder* would the limitation be exempted from objection on the score of its being destructible; that, in fact, an executory limitation is not protected from the Rule against Perpetuities, when destructible by tenants in tail. Now, there can be no doubt that just as an executory limitation when engrafted on an estate tail, is barrable equally with a contingent remainder postponed to it, so an executory limitation which can be thus destroyed is, on that account, valid equally with a contingent remainder which is in like manner destructible. Therefore, it is simply a doubtful inference to which this conciseness in the report has given rise; and the ground of the decision to be collected from the judgment, is perfectly satisfactory. Obviously, however, whatever else may be in doubt, it is certain that the Lord Chancellor gave no sanction whatever to the contention that, *as a remainder*, the limitation *could* not be bad for remoteness. On the contrary, by carefully adverting to the fact of the remainder in that case being destructible, his lordship shewed (to say the very least) that he intended not to adopt that doctrine for any purpose; for if a remainder, *qua* remainder, cannot be too remote, it is beside the question to speak of its being either destructible or not destructible as an element in the inquiry whether it is valid. It would be satisfactory to be able to refer the opinion delivered by Lord Brougham in this case to the same considerations which weighed with the Lord Chancellor. But there are some observations in the earlier part of his lordship's opinion as reported which cannot well be reconciled with the ground taken by Lord Cottenham, and still less (as the writer humbly ventures to think) with the history and actual state of the law of Perpetuities. One passage, however, follows, which places the decision on a consistent footing.

"Now, having said thus much on the grounds of the doctrine of remoteness, it appears to me that it has been erroneously imported in this case. There cannot be remoteness here, for the preceding estates are all capable of being barred." But, following upon this passage, is an observation suggesting the very same inference which has been already adverted to as rendering the meaning of the Lord Chancellor somewhat doubtful. For Lord Brougham says,—"And if this limitation in question be a contingent remainder, it will go with the preceding estate." But could not a springing or shifting use equally have been barred? and yet it would not have been barred merely as "going with the preceding estate." The destructibility of the limitation had no necessary connexion with its character or *status* as a contingent remainder.

In fine, of this case of *Cole* v. *Sewell*, after all the prominence given to it upon the question of remoteness in limitations of remainders, the lame and impotent conclusion is precisely that which Lord Brougham has indicated:—The doctrine of remoteness was erroneously imported into the case.

The other views upon the general question of remoteness in limitations of remainders, may here be introduced, before proceeding to examine that which has been stated as the first.

Secondly. The view advanced by Mr. *Jarman* (*j*), and the writer (*k*) (with all submission to the very learned Lord Chancellor of Ireland) is the direct negative of the preceding one: they hold that the rule of law as to the vesting of remainders is not to be construed and does not operate in the manner suggested, and does not provide any guarantee against undue remoteness in remainders.

Thirdly. But the writer is constrained to differ from Mr. *Jarman* (*l*) and others (*m*), when they regard the rule against Perpetuities as a mere amplification, or as a new or more definite and precise development of the old doctrine disallowing a pos-

(*j*) 2 Jarm. Wills, 733.
(*k*) Treat. Perp. 416.
(*l*) 2 Jarm. Wills, 734.
(*m*) Law Mag. vol. 31, p. 362.

sibility upon a possibility. He submits (*n*) that that doctrine is at the present day entirely exploded in reference to limitations of remainders, or, at least, that the Perpetuity-rule is of original and independent operation.

Fourthly. Some, again, (*o*) consider that as to cases not within the 8 & 9 Vict. c. 106, s. 8, the destructibility by tortious means of contingent remainders protected them from all possible objection of remoteness, and that remainders might, therefore, be originally limited without regard to remoteness either in objects or contingencies, and, as a necessary consequence, that they might also in the event take effect, irrespectively of the laws of Perpetuity, if not actually destroyed by the tenants of the particular-estate.

Fifthly. Another opinion to be met with in the Profession is, that the rule prohibiting a possibility upon a possibility is still of force, and that, although it will not now avail to condemn a limitation on the ground of the mere multiplication of possibilities in the choice of objects or events, it yet prohibits the limitation of a contingent remainder after a life-estate to a person unborn, so as not only to prevent such ulterior estate from taking effect in the event of its becoming capable of vesting during the continuance of the freehold estate originally contingent, but also to disallow its being limited in any manner implying a possibility that it should do so.

Whether there are any minor variations or shades of difference in opinion besides those here indicated, it is impossible to say, but it will probably be found that the views now detailed adequately represent the present condition of the controversy.

First. The real point at issue in reference to the first of the positions above stated contemplates (as already shewn (*p*)) the precise meaning and effect of the fundamental rule in the law of remainders, that every remainder must vest and take effect during the continuance or at the determination of the

(*n*) Treat. Perp. 419, 601, 602. 2 Prest. Abst. 114.
(*o*) See 8 Jurist, 23. *Et vide*
(*p*) Treat. Perp. 410.

particular-estate. We have already seen what is the effect of this rule when the remainder is limited in dependance upon a life-estate or life-estates, given to a person or persons *in esse*, but, in order to ascertain the true meaning and operation of the rule, it is necessary we should proceed to apply it to other and more complex forms of limitation. And, to exhibit the connexion of the rule with the present subject, it is only necessary to suppose the case of a limitation to A. for life, with remainder to his eldest son (unborn) for life, with remainder to his issue; or any other case where there are two or more life-estates not all limited to persons *in esse* and in reference to which ulterior limitations might be too remote, if the objection were not precluded by the rule under consideration. That all the limitations subsequent to the first are and must take effect as *remainders*, is indisputably clear. Does, then, the estate of A. alone constitute the particular-estate, not only to the remainder of his unborn son, but also to the ultimate remainder of the grandchild? In fact, must that ultimate remainder, in order to take effect at all, vest during the continuance of A.'s estate? Or, on the other hand, do the two life-estates together, or does each of them in its turn, form the particular-estate, during the continuance of either or any part of which the ultimate remainder may take effect? If the former view hold, the remainder cannot possibly be too remote; if the latter, it may.

The construction of the rule to which the writer is committed, and which in all deference he ventures to re-affirm, is (*q*), that until the contingency arises the interest depending on it must be supported by some preceding particular-estate of freehold vested in interest, and in relation to which the estate to arise on the contingency is a remainder, and that the remainder must vest in interest before the determination of such vested estate, or in the instant in which that estate determines; and it is clear, therefore, that when the freehold

(*q*) Treat. Perp. 411.

secondly limited vests at or before the determination of the first freehold interest, the ulterior contingent remainder continues to be supported by a preceding vested estate (during the subsistence of the first freehold, by *it*, and after its expiration, by the subsequent particular-estate); and that the rule will be satisfied if that remainder be capable of taking effect at the determination of the vested interest by which it is so preceded.

Now (without repeating arguments already advanced), in order to see what is the proper scope and force of the rule as to the vesting of remainders, apart from any particular explication it may have received, its original spirit and design must first be ascertained. That rule is strictly and entirely *in pari materiâ* with the other fundamental doctrine, that a contingent remainder of freehold must have a particular-estate of freehold to support it; and both these rules are developments or practical illustrations of the grand feodal doctrine that the freehold seisin must never be unrepresented by an owner,—that same doctrine, of which the kindred rule, that an estate of freehold cannot be created to commence *in futuro*, is also a genuine offshoot. Apart from this principle, the rule in question is unmeaning, arbitrary and baseless; and when, therefore, it is said that the particular-estate *supports* the remainder, the only sense in which the office of the particular-estate is to be so understood, is, that it is the estate which keeps the seisin full during the abeyance of the remainder. There is, undoubtedly, no *magic* in the connexion between the freehold estate and the contingent remainder, and it should be denuded of the cloudy mysteriousness with which the technical language wherein it is clothed is apt to surround it.

The next observation is, that if the operation of the rule in any given case is not expressly pointed out by it, or by the general law or its received exponents, the applicability and effect of the rule in that case must be determined by reference to the principle which pervades it and to which its origin is to be attributed.

Now, it is perhaps not incorrect to say that in no reputable authority is it laid down, in what sense the rule is to be taken in cases where, of several freehold estates preceding a contingent remainder, one of them is itself contingent as limited to a person unborn (*r*). In all our great text-books and authorities, the same phrase "particular-estate" constantly occurs, but its meaning and application under the circumstances supposed are never discovered to us, nor does occasion appear to have ever arisen for the judicial consideration of the question; although, as is afterwards remarked, there have been several decisions *plainly implying* the reverse of the construction under review. There is, however, a very satisfactory statement of the doctrine applicable to the case of successive limitations of *vested* estates of freehold, which shews clearly enough that the estimate of the general rule formed by Lord Chief Baron Gilbert (*s*) was precisely that here put forth. "The particular estate being the sole time of limitation in which these contingencies are to take place, the merger of that estate is the destruction of the remainders; and this, whether such remainders be limited at common law or by way of use. But then *every* particular estate upon which such remainders depend must be taken away; for the remainder is the remaining part of *each* particular estate, when there are *more than one* in the limitation; and *each* particular estate is the time appointed by law, when such contingent remainders are to vest; and therefore the destroying of *one* of these particular estates is no destruction of the remainder."

But, treating it as entirely *res integra*, we may proceed to the observation that the original reason and principle of this

(*r*) An opinion of Mr. Yorke (afterwards Lord Hardwicke) is indeed extant (see 2 Ca. & Op. 440) which may seem to be an exception, but it was at variance with the sentiments of Mr. Booth in the same case, and is, moreover, grounded on the notion of a possibility on a possibility, which renders it inapplicable to the present division of our subject.

(*s*) See Bac. Abr. tit. "Remainder and Reversion" D., stated to be a treatise written by the learned judge above named.

important rule do not in any degree require that contingent remainders should vest during the continuance of freehold estates vested from their inception, as contra-distinguished from estates originally limited in contingency, inasmuch as, if the latter vest and take effect at the determination of the former, and the ulterior contingent remainder vest during the continuance or at the determination of the last subsisting freehold estate, there is at no time and in no event any abeyance of the freehold seisin, and the rule of law is in no wise infringed. During the whole period intervening between the creation of the estates and the vesting of the remainder, that remainder is *supported* by vested particular-estates of freehold, and the circumstance that one of these intermediate estates for life was originally itself a contingent remainder, cannot possibly affect the conclusion, since, not only while it was a contingent, but also while a vested interest, in expectancy, the ulterior remainder was sustained by the prior vested freehold, and its successor only afforded that support when it attained the character of a vested estate in possession. If it never take effect in possession, the contingent remainder is supported solely by an estate originally vested, and it will fail, if it do not take effect before or at the determination of that estate.

The conclusion from these considerations seems irresistible, —that there is nothing in the rule of law which requires a contingent remainder to vest during the continuance or at the determination of the particular-estate, to preclude a freehold interest for life which may itself have been originally contingent, from filling the character of particular-estate to an ulterior contingent remainder, after it has taken effect in possession; or, in other words, that the term "particular-estate" is not confined to freehold estates originally vested.

There are still, however, several collateral considerations of which it may be well to disencumber the subject, and some also which are available in support of the conclusion just expressed.

Thus, it may be remarked that the contingent remainder,

in the case supposed, is not at any time prior to its vesting open to the objection of being preceded by a mere contingent interest of freehold, inasmuch as the only interest originally limited in contingency has (*ex hypothesi*), at the time of its standing in the relation of a *preceding* estate, within the meaning of the rule as to particular-estates and remainders, become a vested freehold interest in possession, and, so far as regards its quality, therefore, capable, if necessary, of supporting a contingent remainder.

Again, it must be clear that the question is not adversely concluded by the remark of Blackstone (*t*), that "there can be no intervening estate between the particular-estate and the remainder supported thereby," since the *quæstio vexata* still is, *what* interest constitutes the particular-estate to each several remainder; and it is, moreover, plain, on reference to the authority quoted by the great Commentator, that the objection he had in view simply pointed to the intervention of a period of time between the determination of the particular-estate and the commencement of the remainder. He simply, in fact, intended to say, as it has with greater precision been expressed (*u*), that if there is any intervening undisposed of portion of seisin between the determination of a prior interest and the commencement of a subsequent contingent interest, such subsequent interest cannot take effect as a remainder, because, when the period of the determination of the prior interest arrives, the subsequent contingent interest fails, for the same reasons as a contingent interest (*v*) which is limited to take effect as a remainder after a chattel.

Further, in the case of one of several freehold interests being contingent in *event* only, it appears impossible to contend that, after the vesting of such estate, it is not equally capable in its turn of supporting a contingent remainder, with the vested freehold interest by which that remainder was originally and

(*t*) 2 Com. 168.
(*u*) Smith's F. C. R. vol. 2, (Original View), p. 442.
(*v*) *Qu.* of freehold?

from the first preceded (*w*). Thus, if there be a limitation to A. for life, remainder to B. if he survive C., remainder (contingent on the same event) to all the children of B., there cannot be a doubt that, if B.'s life-estate vests and takes effect in possession, his children born as well after as before the determination of A.'s interest, would be entitled to participate under the ultimate remainder. But, can the mere circumstance that the contingency of one freehold interest is in the object, and of another, in the event, occasion so complete a variance in the scope and capacity for taking effect of the respective ulterior remainders?

And this leads us to observe that, in the case of a gift to A. for life, remainder to his unborn son for life, remainder to *his* children, the consequence of holding that the ultimate remainder must vest at the determination of the first freehold estate is, that of several children of A.'s son, those only who are living at the decease of the grandfather can claim under the limitation. It has been already said that when property is limited to a class of persons by way of remainder, those members only of the class are entitled, who are *in esse* at the time of the determination of the particular-estate; but it may be well doubted whether objects coming into existence during the subsistence of an actual preceding freehold interest, although not until after the determination of the first vested estate, could be excluded upon that ground; nor is it a *petitio principii* or an argument within a circle, to apply the conclusion as a test of the meaning to be put upon the term "particular-estate."

Yet further, it is clear, since it is admitted by all that, in the case of two freehold estates originally vested, that for the time being in possession forms the particular-estate, and that if the contingent remainder vests before the determination of the last subsisting estate, it is good, no objection can be taken to the transmutation of the term particular-estate (when the

(*w*) 2 Jarm. Wills, 733.

latter of the two partial interests is contingent) from the first estate which was originally vested, to the second when it vests and takes effect in possession, or rather, to the including both the freehold interests under the designation of particular-estate, and the establishment of the ultimate remainder on its vesting during the continuance of any part or portion of that estate.

And, once more, if a limitation were made to A. for life, remainder to his children (unborn) successively in tail, remainder to the children of B. (a person *in esse*) successively in tail, and the estates-tail of the children of A. (there being such, but their estates not being barred,) should naturally expire, it is plain no inquiry would be made, for the purpose of ascertaining the validity of the ulterior remainder, whether there were children of B. in existence at the decease of A., but any such children or their issue living at the time of the failure of the prior estates-tail would be entitled; and yet no assignable difference exists between the supposed case and the case where the intermediate estate is not a descendible freehold.

In the preceding observations it has been assumed as indisputable, that the common law rule relative to the vesting of remainders has reference to *tenure;* and, indeed, such has been the almost universal (and is, beyond doubt, theoretically the most correct) opinion upon the subject. Granting, however, as is supposed by some (*x*), that the rule is not at all or not solely referrible to such grounds, but that it is simply, or to some extent, directed to the preservation of an uninterrupted connexion between the particular-estate and the remainders, as being in the consideration of law merely several parts of one whole estate, and against the creation or origination of infinitesimal portions or fractions of ownership, it should seem that the influence of the considerations flowing from that doctrine tend in the same direction as those already indicated. For, it is obvious that, if such be the sanctions of the rule, their inte-

(*x*) 3 Re. Pr. Com. Rep. 23, 24.

grity is maintained by the due succession of estates and interests immediately upon one another without any lapse or interval; and to the attainment of that object it is in no wise necessary to place any restriction upon the vesting of the several interests, so as they take place in their proper order, whether as originally appointed, or modifiedly according to the course of events.

And, in harmony with this conclusion, it is observable that, in reference to the essence or intrinsic nature of remainders, it has, on good authority (*y*), been declared, that it is the uninterrupted succession of future estates which properly constitutes remainders; any interval of time which is interposed between estates in succession having the effect of destroying the next and every subsequent estate, if any.

And, lastly, it is particularly remarkable that the very eminent lawyer, Chief Baron Gilbert (*z*), as if perceiving the inefficiency of general principles to preclude the limitation of remote remainders, has actually assigned the tendency of such estates to remoteness as the principal basis of the rule requiring them to vest at the determination of the particular-estate,—thus apparently confounding cause and effect, and that, too, incompatibly with the plain fact that at the balmy period of common law strictness in which the rule in question took its origin, the evils of Perpetuity were not so much as imagined, still less, provided against.

It seems, then, upon all the considerations which can be brought to bear upon the subject, that there is nothing in the intrinsic force of the doctrines which govern common law remainders, apart from the Rule against Perpetuities, to preclude future interests by way of remainder from being limited in due order to successive generations of issue, or other unascertained objects, or upon indefinite contingencies, however remote, or from taking effect agreeably to those rules in the course pointed out by the limitations. So far, consequently, as respects the force of those doctrines, there appears to be a

(*y*) 3 Re. Pr. Com. Rep. 23.
(*z*) See the quotation; 3 Re. Pr. Com. 24.

necessity for the application of the laws against remoteness to contingent remanders limited upon remote contingencies, as strong as can be supposed in regard to the strictest executory devise or springing or shifting use, and the conclusion cannot be avoided that such remainders are in fact within the Rule against Perpetuities.

It has been already intimated that the opinion of the very learned Mr. Fearne confirms this view (*a*), and, in order to place the point beyond doubt, it may be well shortly to state a case in which that opinion was practically exhibited. The case (*b*) related to copyholds: but this does not render the authority less apposite; for, although contingent remainders in copyhold property are not destroyed by the forfeiture or other premature determination of the particular-estate before they are capable of vesting, they are, nevertheless, under the like obligation with such remainders in freeholds (though upon different grounds) of taking effect on the natural or ordinary expiration of the particular-estate (*c*). Any construction, therefore, which that rule receives in regard to freehold property must (it should seem) be equally applicable to copyholds; and the converse. Limitations in a surrender were made in the following terms:—"*Præfato A. B., pro et durante termino vitæ; et post ejus decessum, M. uxori præfati A. B., pro termino vitæ; et post decessum præfatorum A. B. et M. B. et diutius viventis, tunc seniori exitu masculo de corporibus dictorum A. B. et M. legitimé procreato vel procreando; et, pro defectu ullius exitûs masculi de corporibus prædictis, tunc exitui feminino de corporibus prædictorum A. et M.; et pro defectu talis exitûs, tunc rectis hæredibus præfati A. B. in perpetuum.*" After observing that the limitation to the eldest son passed only a life-interest,

(*a*) Cont. Rem. p. 502. It ought almost to excite surprise, that so emphatic a declaration from the pen of Mr. *Fearne* upon a point which intimately concerns *contingent remainders*, has not had weight in the present discussion proportioned to the value of his authority.

(*b*) F. Posth. 294—298.

(*c*) Gilb. Ten. 265, 266. F. C. R. 320, 10th edition, and Smith's Original View, 450. Scriv. Cop. 477, 480.

and that the limitation to the issue female was equally restricted, and failed on account of there being issue male, and that if the remainder to the right heirs of A. B. were good it would unite with his life-estate and confer a vested remainder in fee, expectant on the estate for life in the eldest son, Mr. Fearne proceeded to say,—"The difficulty is, how the limitation in the surrender to the right heirs of A. B. is to be supported, being after a failure of any male issue of the bodies of him and his wife, without a preceding limitation extended to that period; for if it depended on a default of any issue male; that is, on the event of there being no issue male, then it failed by reason of the existence of such issue male; and if, on a general failure of issue male at any time, then, as a remainder, it could not take effect *unless such default of issue happened*, at furthest, *by the expiration of the preceding estates*, viz., *the deceases of A. B. and his wife and their eldest son;* and that will not be the case, if any issue male of A. B. should be living *at the death of his eldest son D.;* and it seems to me too remote in any other view." And, again, with regard to the eventual failure of the limitation to the issue female,—"When the ulterior limitation is not confined to the failure or determination of the preceding estate, but is made to depend on an event collateral thereto, then, *unless such event happens by the time that all the preceding estates determine*, (if not supported by a trust) I apprehend it fails of course, *as well in the case of copyholds as freeholds.*" Here, it will be observed that the life-interest of the eldest son, which was allowed to stand as the particular estate to the ultimate contingent remainder, was (to all appearances) itself originally contingent as being limited to a person unborn; or, if D., who eventually became entitled under the description of eldest son, was living at the creation of the estates, and so the remainder for life to the eldest son was from the first vested, it cannot be supposed that the general observations of the learned writer were especially directed to that circumstance, but would have applied equally to the estate of any per-

son who might have become entitled as eldest son by the death of D., although not in existence at the date of the settlement.

Secondly and *Thirdly.* The subordinate variance in opinion as to the process whereby the conclusion which has been stated is arrived at, relates to the extent of the connexion between the modern rule of Perpetuity and its older ally, the doctrine as to a possibility upon a possibility. That such a doctrine flourished in the time of Lord Coke, no one at all acquainted with his Reports can for a moment deny; and it may with equal facility be admitted that, in giving currency to the notion, the judges were influenced by an indistinct perception of the possibility of effecting ingenious dispositions of property devious from the rigid line and strict rule of the common law. But, the most cursory glance at the illustrations by which its great admirer sought to unfold its meaning, must convince every one, how utterly idle it is to attempt to refer the doctrine to any precise notion, or to base it upon any intelligible principle; nor is it less true that the most comprehensive construction of the descriptions of the doctrine furnished by its professors, leaves us without the slightest ground for supposing that freedom of alienation was an object at all influential in its discovery or application. In a word, the conclusion seems inevitable, that (*d*) this doctrine, while it embraced many limitations of future estates that would have been equally void under the modern perpetuity rule, and likewise some that would have been *not* void, yet failed to meet others which are clearly condemned by the latter, and, therefore, afforded no guarantee against undue remoteness in common law estates; but that, at the same time, its effect unquestionably was, to deter donors and settlors from the grant and reservation of future rights of a remote character, on account of the indefinite nature and oblique operation of the

(*d*) Treat. Perp. 603.

doctrine, and the consequent uncertainty as to how far the dispositions in question might be affected by it.

It should seem, then, that the identification of the two rules which has been thought so advantageous (*e*) is not tenable (*f*); nor will the alternative be the continuance of anomalous and inconvenient distinctions, if we are at liberty to hold that the scholastic figment of the seventeenth century is (so far as respects the law of remainders at least), for all influential purposes, to be at the present day entirely discarded. That such an opinion is not deficient in respectable support, the judgment of Sir Edward Sugden (*g*), in the case of *Cole* v. *Sewell*, independently of various other authorities formerly quoted (*h*), sufficiently testifies.

It is difficult, moreover, to sympathize with the objection anticipated by a learned writer (*i*), as the consequence of dissociating the laws against Perpetuities from the doctrine as to common and double possibilities, in the transgression of judicial, and the intrusion upon legislative authority which it is said to suppose. The establishment and application of those laws may or may not be open to such an objection (and their utility certainly will not suffer from the recognition of their judicial extraction); but, granting that such an objection might exist, it assuredly cannot be obviated by maintaining a connexion between the perpetuity-rule and the doctrine upon possibilities, since no traces of the doctrine upon possibilities (venerable as is its aspect) are to be discovered, until after the introduction of those executory estates and interests in relation to which it is that an encroachment on the part of the judicature is supposed, and alone can be supposed.

(*e*) 2 Jarm. Wills, 734.

(*f*) See some cogent reasoning as to the expansion of the double possibility doctrine into the modern Rule against Perpetuities, in 8 Jur. 23.

(*g*) 2 Con. & Law. 360; 4 Dr. & War. 28, 32.

(*h*) See these cited in Treat. Perp. 612, 613.

(*i*) 2 Jarm. Wills, 734, 735.

It is said that there is no warrant for applying to remainders the provisions of the Rule against Perpetuities because no such rule was recognized in the early period of our legal history when, although limitations by way of remainder were known, executory interests may not have been introduced. But what if it should appear that no occasion had been found in that early period for such a restrictive provision? The rule, of course, had some special origin: there must, of necessity, have been some particular predisposing circumstance to originate it. The argument is, that that circumstance was the introduction of executory limitations, and thence it is sought to be inferred that to the boundary of executory limitations must be restricted the operation of the rule? But why? Was an evil previously tolerated under the form of remainders, which, when introduced under shelter of executory limitations, it was deemed necessary to exclude? Certainly not: there is nothing to shew that the evil had been experienced in previous times; still less, that it had been tolerated. What first exhibited the danger became the parent of the remedy: but why is the remedy held to be restricted to that particular case, when, in subsequent times, the same evil shews itself in other forms?

Again, the objection is, you introduce an *ex post facto* law for remainders. It is difficult to discover in what sense this applies to remainders, which is not equally predicable of executory interests. Were not executory interests actual facts in our legal system prior to the discovery of a rule for the prevention of immoderate remoteness? What undue stretch of authority is involved in applying to remainders a necessary rule which, by the same authority and no other, and upon considerations of necessity, was imposed upon executory interests?

But, in truth, there is a mistake in supposing that remainders were the only species of future limitation known to our law before the reign of Henry 8, when executory interests, as it is said, came into use. If it can be shewn that in that *earlier* period *executory interests* were admitted, as well as

contingent remainders, then any observation which is founded on the absence at that time of rules against remoteness, would go to shew, on the one hand, that whatever impropriety attends the application of the rule to remainders existed equally in its application to executory interests, and, on the other, that the doctrine found necessary for executory limitations ought to be consistently applied to remainders, unless there be something in the nature of those limitations which dispenses with it. There would be no alternative but the consistent application of the rule to remainders, because, in reference to that rule, both remainders and executory interests are in the *same* predicament. Whether it were contingent remainders or executory limitations which furnished the first and immediate occasion for the introduction of the rule, cannot, in this view of the matter, be material when the question is, whether in principle, in policy, and in fact, it does not equally govern both.

Now, why was it that, even in Littleton's time, a man might by his will, when authorized by custom to make a will, give to his executors a power to sell and convey his land, without vesting any estate in them for that purpose? Why was it that in Littleton's time, again, a man might by will transfer the legal title to a reversion without any attornment of the tenant? Both these cases are put by Littleton in his 169th and 586th Sections. When Littleton wrote there was no Statute of Uses, and not any Statute of Wills, and yet he tells us broadly that a man who has no estate in the land may, under a power in a will, effect a change in the legal title to it. Could this power be given by any machinery then known to the law appropriate to a *deed?* Clearly, it could not (except perhaps in the single case of a *remainder* after a previous life-estate "to such persons as one should direct or appoint.") Now, the authority thus furnished to us is amply sufficient for the purpose of investigating the origin of the system of executory devises as now known to our law. The case stated by these old writers supplies this clear and bold result:—That by devise estates in land might be created in forms which the

rules of the feodal common law excluded from the machinery of a conveyance or settlement by deed. None of the modern cases which can be supposed of executory limitations, give any result *more* forcible or striking than this. The repugnance to the rules of the feodal common law was complete and incapable of being explained away consistently with the integrity of those rules. No immediate seisin passing out of the devisor or of his heir—the vested inheritance of the heir taken out of him by the act of another—no estate in that other by virtue of which his act took effect, or to which it could be referred. These were prominent features in the case supposed. And nothing *more* opposed to the rules of the common law is furnished by the cases familiar at the present day of a contingent remainder unpreceded by a freehold estate, or a vested limitation defeated by a subsequent one, or a freehold *in futuro*, or a fee upon a fee. There are different peculiarities in these several cases, but none exceed the repugnance to the rules of the common law as applied to deeds furnished by the simple case of the power in executors. Then, what is the conclusion which that doctrine stated by Littleton warrants and requires us to adopt? Surely this:—That before the Statute of Uses and before the Statute of Wills, estates in land might be created by will in forms and modes not reconcileable with the rules of the feodal common law which governed conveyances and settlements by deed.

If we inquire what bearing have the Statute of Uses and the Statute of Wills upon the question, we shall find that the superior freedom of limitation of estates conceded to wills, was not derived from those sources. As regards the Statute of *Uses*, it is clear that even supposing chronology offered no difficulty, and that the Statute of Uses had been passed *before* the power of creating estates in wills unknown to the rules of the common law in deeds was recognised, yet the origin of that power cannot be attributed to the Statute of Uses, because all the essential parts of the machinery of uses as comprised and defined in that statute may be dispensed with in a will, and

yet all the same powers and facilities for the creation of estates will exist which the system of uses itself authorizes. And what of the Statute of *Wills?* Are we to attribute to any language of this statute (such as its authority to devise lands "at the free will and pleasure of the devisor,") the origin of the power ever since allowed to create estates in land by will which should not be conformable to the rules for limiting estates by deed. The words of the statute clearly were *capable* of giving this power, but the question what *was actually* effected by them, is a different one. The power of devising given by the statute was not a new mode of alienation then introduced for the first time, but it was simply an *extension* to all places of a power which was previously recognized by the law, in some particular places. If, then, this limited and *partial* power of devise which *before* existed, might by law be exercised in a manner devious from the rules of the common law, as to conveyances by deed, it would naturally have followed that, unless positive provision were made in the statute to the contrary, the enlarged power of devise would be attended with the same advantages and incidents, which previously belonged to the more contracted devising power, that, namely, which was allowed in some few places only. Now, this is more than a mere historical criticism, when we consider what might be the consequences of the *total repeal* of the statute of Henry 8, which was effected by 1 Vict. c. 26. If the previously existing law was of itself sufficient to authorize these testamentary limitations, it would, of course, follow that the repeal of the statute of Henry 8, would in no wise affect the executory limitations which existed previously to the making of that statute, unless the repeal were accompanied with positive and express provisions operating by way of restriction or qualification of the power conferred by law *before* the statute of Henry 8 was made. Clearly, the statute of 1 Vict. does *not* contain any such restriction or qualifying provision, so far, at least, as concerns the matters we are now inquiring into. But, on the other hand, it contains no language

of any kind, to supply the place of those words in the statute of Henry 8 which are sometimes supposed to have introduced the power to create executory devises. But, will any one contend that that power has been abolished? Clearly, it has not, upon the view of our legal history which has been *here* insisted on. By that argument we are enabled to say that, whatever the provisions of the law may have been at the time when the statute of Henry 8 was passed, in respect to the power of creating estates by devise, and the manner and modes of creating them, they still subsist, and are applicable to the devises which are authorized by the statute 1 Vict. c. 26. Let it be borne in mind, however, that if those powers were attributable solely to the particular expressions *in* the statute of Henry 8, they are not applicable to the devises authorized by the statute of 1 Vict., but have been abrogated.

The result, then, of this glance at the history of the subject, is, that the principles involved in the system of *feuds*, precluded certain forms and methods of limiting land, now known by the name of executory limitations: there was a power to *devise* land which was not a power proper or *incident* to the feudal system, but, on the contrary, existed in spite of it: this power to devise was exercised in some cases, in a manner not agreeable to the principles of the feudal system; *i. e.*, forms and methods of limiting land were used in a devise, which were precluded by the feudal system, as applicable to assurances *inter vivos:* then, at a subsequent time, this power of devising, which was partial only so long as feuds exercised an uninterrupted influence, was extended and made general by the Legislature, and there was no qualification or restriction annexed to the *manner* of exercising this extended and more general power: and, accordingly, the result of this statutory extension of the devising power was, that the principles of law which, previously to the statute, authorized the creation of executory limitations by devise under the custom, became applicable to the devise authorized and empowered by the statute. The thing allowed by the statute was the same in kind and

substance with the thing which existed before the statute, and during the prevalence of feuds; and the incidents and qualities which previously attached to it, in the particular instances in which it was allowed, naturally and properly attached to it, when extended to the other cases, from which, before the statute, the doctrine of feuds excluded it; and one of the most prominent of those incidents and qualities was, the creation of executory estates contrary to the rules and doctrines of the feudal system (on the ground that the devise was not itself feudal). Where, then, is the contention that before the time when the Rule against Perpetuities was introduced, and occasion for it first discovered, a remainder was the alone method of limiting future estates? and what becomes of the inference that the Rule against Perpetuities can be applied to executory limitations only, and not to remainders? As the writer has all along said, he disputes the justness and sufficiency of the premiss, even if proved, to support the conclusion: but the premiss is not proved; on the contrary, it is unsound.

Fourthly. The view next demanding attention is that which refers the alleged exemption of contingent remainders from the laws of Perpetuity, to their former destructibility by the particular tenants: and, assuredly, (although the statement may appear paradoxical) of all the arguments to be advanced on that side of the question, this is at once the most palpably inconclusive, and yet, at the same time, the least tangible and (in that light) least susceptible of detailed refutation. For, how stands the case? A contingent remainder, owing to the feodal imperfections which attended it, was liable to destruction or extinction as a consequence of certain forced transactions respecting the particular freehold, or between the owner of that freehold and the parties entitled to subsequent vested remainders. The destruction by such means of these imperfect interests was not permitted by the law as an ordinary or recognised auxiliary to the transfer of property by means of the common assurances of the realm: it is emphatically designated and reprobated as a tort; a wrong without a

remedy, it is true, but only because the integrity and fundamental principles of the real property system impliedly necessitated it as a consequence, and could not, therefore, at the same time, punish it as a fraud. The act is one, moreover, of which Chancery will not admit a counterpart, in its less rigid jurisprudence; and which, when effected by persons having legal interests but clothed with a fiduciary character, it visits with expressive condemnation; and of which, again, it declares its disapproval by its treatment of titles indebted to the destruction of contingent remainders for their sufficiency. To represent the matter in the mildest form, the power of destroying contingent remainders is one *strictissimi juris:* the law says concerning it, as our Courts Christian (though, perhaps, with less of plausibility) declare of lay and heretical baptism,—*fieri non debet, sed factum valet.* Can it be seriously laid down, then, it may be asked, that this bare possibility of the tortuous extinction of contingent remainders, towards which our law casts only an averted glance, can be contemplated by that same law as a sufficient ground, nay, the sole basis, for a conclusion upon an independent and integral subject confessedly the reverse of its ordinary rule? Is there, by virtue of the doctrine in question, such a perfect, unimpeachable and independent power of alienation, as in the usual course of law, in relation to these future estates, that any assistance from the ordinary rules for securing freedom of alienation is not only uncalled for, but absolutely precluded? As well might it be said that the chance of *executory estates* becoming *barred* by lapse of time under the Statutes of Limitation, is sufficient to prevent in them any undue tendency to remoteness! an argument of which the veriest tyro would perceive the fallacy.

And here the writer cannot but protest against an argument lately advanced upon this point which is opposed to the true genius, and derogatory from the proper dignity of the law against perpetuities. In reference to an incidental suggestion presented by Mr. Jarman as to the strength of the influences

moving tenants for life in particular cases to the destruction of contingent remainders, it has been said(*j*)—"the rule is directed against the *inconvenience* which is *felt* when property is tied up: if no inconvenience is *felt*, none exists." Surely, this is an inversion of the order of reasoning upon the subject. The release of the property from its fetters after a certain period is the direct and independent object of the rule, without reference to the feelings or inclinations of individual owners; the law does not step in as an indirect instrument for effectuating private intentions, but proposes to itself a distinct and ultimate purpose, to which those intentions must be subservient. Inconvenience begins when the boundary fixed as the limit of convenience is transgressed. Were any less definite criterion substituted, the feelings of many a modern *Thellusson* would be consulted in a manner shewing too clearly, how far removed with some was all sense of *inconvenience* from the locking up of their possessions.

It has been supposed that the situation of contingent remainders liable to be destroyed by the tenant of the particular estate, resembles the position of remainders expectant on an estate tail liable to be destroyed by the recovery of the tenant in tail. But surely this is not so. The power of barring the entail is provided by the law expressly to obviate the evils of a perpetual entail: it is a power which the law holds to be inseparable from the estate tail; and accordingly any provision made for defeating the estate upon an exercise of this power, the law declares to be futile. But especially it is to be observed, the recovery of the tenant in tail enlarges his own estate: the fee acquired by him takes effect out of his own previous inheritance: in a word, the virtue of the assurance springs out of the estate tail,—is proper to it. But the destruction of a contingent remainder by tenant for life, can be brought about only by the forfeiture or extinguishment of his own estate.

(*j*) 8 Jurist, 23.

With reference to the protection from destructibility afforded by limitations to support contingent remainders, it is to be observed that, although not absolutely complete in cases where such a limitation is itself originally contingent as postponed to a life-estate limited to a person unborn, yet, after that life-estate has vested (no destruction of it having previously taken place), its operation commences, and the remainders, so far as they depend on such estate, are indefeasible by the owners of prior estates, and yet such remainders may be too remote, viewed in regard to the law of perpetuity. And the like may be said of any contingent limitation to preserve, although postponed to several successive life-estates limited to persons not *in esse*, each of whom, perchance, is to be the descendant of the preceding freeholder: always supposing, however, that the limitation to the trustees is not itself too remote as limited after an estate void on that account. It is confidently submitted, therefore, that, in this manner and to this extent, the estate of trustees to support contingent remainders may operate as a protection to remote remainders. Undoubtedly, at law there would be no distinction between the estate of the trustees and any other vested estate, and, by the wrongful act of the trustees, the remainders might be destroyed. But, does it make no difference in the argument that there is a vested estate in remainder created with an express trust upon the donee of it binding him to preserve the subsequent contingent remainders from destruction? Would even a Court of Law take notice, in such a case, of the possibility of destroying the contingent remainders? Would that be a sensible or reasonable doctrine which exempted remainders from a rule otherwise universal, in contemplation merely of the possibility of two misfeasances being committed; one both a legal and equitable misfeasance, and the other equitable?

More might be urged in refutation of the argument now under consideration, but, in the view which the writer takes of the effect of an enactment of the Legislature passed since this discussion was opened, it would be idle to enter at any greater

length into the question. By the 8 & 9 Vict. c. 106, s. 8, a contingent remainder existing at any time after the 31st December, 1844, is made capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in the same manner, in all respects, as if such event had not happened. What is the effect of this enactment in reference to the question of the applicability of the doctrine of remoteness to contingent remainders? Now, it is apprehended that the contention we have last been considering, was—not that there might be a Perpetuity in the form of a contingent remainder, but—that there was an incidental circumstance which averted from such a remainder, the risk of becoming a Perpetuity. It was not said there was any direct independent rule of law which excluded a remainder, from the general scope of the Rule against Perpetuities, but that, while *primâ facie* within the rule, it was in fact *exempted* on the ground of one of its legal incidents, which indirectly satisfied the purpose of the rule. That legal incident no longer exists. And, since the exemption did not arise otherwise than as the consequence of the incident, and co-extensively with it, it seems a necessary conclusion, that the exemption (supposing, for argument's sake, it may have been valid) cannot now be allowed. Were the Rule against Perpetuities in no respect appropriate to the character of a remainder, so that the provisions of it could not, with consistency upon any point, be extended to such an interest (which was not contended in support of this fourth view), clearly the alteration in the law concerning contingent remainders might have left the rule and the exemption to it just as they were. But this was not the true state of the case; and as contingent remainders are a species of future limitation which, apart from their liability to be destroyed, might (according to the admission of those to whom we are here referring) offend the spirit of the Rule against Perpetuities, the abrogation of that liability puts an end to any question, whether the rule extends to contingent remainders. But, it is said, this will operate unjustly, as a retrospective impeachment of limitations supposed

to be valid at the time of their creation. This, of course, is a result which does not burthen the argument of the present writer, because he holds that contingent remainders are, upon grounds wholly independent of the statute, within the Rule against Perpetuities. But if we advert to the terms of the act, it will be found impossible to give effect to it, without adopting the view that, whatever may have been the situation of a contingent remainder during the time when the law allowed of the possibility of its destruction, the consequence of now disallowing it is, to subject contingent remainders to the obligation to conform to the Rule against Perpetuities. The act says, that a contingent remainder created before the passing of it, shall be *deemed to have been* capable of taking effect, notwithstanding the premature determination of the particular-estate, in the same manner as if such determination had not happened. This explicit enactment must receive its full effect, by holding that the position, the validity and the operation of the contingent remainder are to be determined upon those principles (and no other), which would have been admissible to regulate it, supposing that it had not at any time subsequent to its creation, been liable to fail by the tortuous act of a particular tenant.

But, let it be observed, there is, by virtue of this enactment, retrospectively a *benefit* to *all* contingent remainders (excepting, of course, those which, as the indirect result of it, may become void), and it is, therefore, not necessarily an objectionable construction which attributes to the clause, the consequence of producing retrospective injury to the few that would be affected by the objection of remoteness.

Moreover, with reference to this statute (arguing still upon the supposition that the fourth view was correct), it is important to bear in mind, that if we do not hold the act to avoid retrospectively remote contingent remainders, subsisting at the time of the passing of the act, we are compelled to accept a far worse alternative, and to attribute to the statute, not merely the effect of retrospectively setting up a number of existing

Perpetuities, but of creating, for the future, in the form of contingent remainders, those very Perpetuities which the law has hitherto always abhorred.

Fifthly. The doctrine remaining to be considered is scarcely more formidable than that just discussed. It aims at discovering the *modus operandi* of the subtle doctrine as to *potentia propinqua et remota.* It confesses that the mere circumstance of the event, the person or the contingency pointed at by the limitation implying a reiteration of possibilities in no way affects its validity. And, indeed, it cannot but do so: for there is no doubt, and it is by all admitted, that, at the present day, a gift to A. for life, and after his decease, to the child of A.'s unborn son, is good, since, as a remainder, it must fail or take effect at A.'s decease; and yet here, if any where, is an instance of a possibility on a possibility, confining that expression to the contingencies and circumstances of the gift itself. But, then, it is attempted to give this doctrine (itself fanciful) an indirect and tortuous operation by referring it to the mutual relation of two or more estates involved in a common predicament of contingency. It is said, in the case of a gift to A. for life, remainder to his unborn son for life, remainder to the child of that son, that although the ulterior remainder cannot be impeached on the mere ground of its presupposing a double possibility in the ascertainment of its object, it is yet void on account of its being postponed to a remainder itself contingent, or, as it is alleged, as being attempted to be sustained by a previous contingent freehold.

Now, assuredly, if ever an argument can be held futile as demonstrating too much, that here brought under notice must be affected by this consideration. It will be observed, this reasoning condemns the limitation affected by it as void *ab initio,* and allows it no opportunity of taking effect under any circumstances; it infringes the fundamental rule that every limitation which can possibly have effect as a remainder shall stand good as such (for, taking even the construction of the rule about which there is no doubt, it cannot be denied that

the ulterior remainder may *possibly* vest during the continuance of the first freehold estate); it disregards the fact that there is not even any necessity that the ultimate remainder should be *preceded in possession* by the intermediate contingent freehold, and, still less, that it should, in event, *depend for support* upon that interest, as the particular-estate; and, in addition to all this, it fallaciously assumes that the last remainder is attempted to be sustained by the preceding estate, as a *remainder*, whereas the simple case is, that it does not, in any respect, hang upon that estate in its character of a remainder, whether vested or contingent, but depends upon it solely, if at all, when it has become an actual subsisting interest in possession.

But, still further to test the soundness of this doctrine, let a case be put of successive contingent estates being limited to persons not standing in the relation of progenitor and descendant, as, to A. for life, remainder to his eldest (unborn) son for life, remainder to his second (unborn) son for life, and so on. It cannot be denied that this case is within the scope of the reasoning on which the argument is based, or, at least, that it is quite as much so as the case first supposed; and yet it is difficult to conceive any one seriously contending that the estate of the second son is void as being limited after a prior contingent freehold, when every day's practice affords instances of settlements, of which the limitation of original and independent estates by way of remainder, to the several unborn issue of a marriage successively, is a primary and essential object (*k*).

The celebrated case of *Mogg* v. *Mogg* (*l*), too, conclusively establishes that, in cases of this kind, the doctrine under consideration has no authority. In that case, there were limitations to trustees during the life of J. H., upon certain trusts, remainder to the children of J. H. for their lives, remainder to their issue as tenants in common in fee; and in default of such

(*k*) It clearly can occasion no difference in respect to this point that the limitations to the issue in these cases are generally of estates-tail.

(*l*) 1 Mer. 654.

issue, the property was limited to the children of P. M. and their issue, in the same words. J. H. dying without ever having had a child, it was held that such of the children of P. M. as were living at the decease of J. H. took estates-tail; and yet, it will be observed, the remainders to those children and their issue were expressly postponed to estates for life limited to a class of unborn persons, and were limited in the alternative with gifts to the issue of those persons. But it is a consideration equally subversive of this notion that, applied to the class of cases just supposed, it embraces limitations which are clearly excluded from the terms of the doctrine of a possibility upon a possibility, as stated by our most eminent real property jurists. From them (*m*), we learn that the essence of the possibility of which the rule does not allow the contemplation, consists in its "amounting to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it." Now, can it be said that the limitation of successive remainders to collateral unborn persons, or persons not lineally descending from each other, involves an aggregation or engrafting of possibilities within the rule thus laid down? And yet, is it not perfectly clear, that if any set of limitations can be said to be embraced by the doctrine under consideration, a succession of contingent estates limited to persons not *in esse*, whatever their relationship *inter se* and although entirely unconnected, must be obnoxious to its operation?

In fact, the simple question is, whether the mere circumstance that a contingent partial estate is interposed between a present freehold and an ulterior remainder limited to a person unborn, can possibly have the effect of rendering that remainder void, except as a Perpetuity, when, if there were no such estate, it would be unquestionably valid. Surely, if to no greater extent, the gift must be as valid in the complex case as

(*m*) F. C. R. 10th edit. 251.

it is admitted to be in the simple one; and yet, if this be true, the argument under consideration entirely falls to the ground.

It is worthy of remark that this doctrine refuses validity *ab origine* to a remainder, although in terms expressly confined to the allowed period of remoteness: it is, consequently, the very reverse of the view which grounds the non-remoteness of remainders on their destructibility; while it is only in an inferior degree opposed alike to that which extends the law of Perpetuity to remainders, and to the more modified doctrine founded on the rule as to the vesting of remainders, which allows them to take effect, if capable of so doing at the period supposed to be indicated by the ordinary rules of law.

In fine, it may suffice to observe of this position, that it supplies an interpretation of the double possibility rule wholly novel and unsupported (*n*); and it is an entirely inadequate argument on which to rest it, to say that it is the only construction by which coherency can be given to the oft-repeated doctrine referring the invalidity of a remainder to the child of an unborn person (taking a *prior estate* for life), to the rule of a possibility upon a possibility. If that rule fail (as it does) to govern cases where the first unborn person takes *no* intermediate estate, it avails as little in regard to cases of the former class; and that it is equally nugatory as respects both, there can, it is conceived, be little doubt. Any attempt, therefore, to bolster up this expiring dogma by means of an interpretation thus unauthorized and inherently objectionable, must prove as ineffectual, as, under our comprehensive and maturely developed real property system, it undoubtedly is unnecessary and undesirable.

Having thus concluded a detailed examination of the different views upon this interesting subject which reject the proposition in question, and ascertained that neither the intrinsic nature of a remainder, nor the rules which ascertain the properties of it, nor the doctrine of a possibility upon a possibility,

(*n*) *Sed vide* Mr. Yorke's opinion referred to *ubi supra*.

can avail to exclude contingent remainders altogether from the laws of Perpetuity, it remains only to present two or three general considerations harmonious with this result.

If there were no other argument capable of being adduced in favor of the position here advanced than that derivable from the well-established doctrine of *çy prés*, the question would, even so, appear entirely settled (*o*). It does, in fact, seem an inevitable conclusion that, before remainders can be held excused from the law of Perpetuity, that doctrine must be at once obliterated from our common law code, and all traces of it effaced from the authentic records of the Courts administering it. For, what do those records present?

They shew, by the cases of *Robinson* v. *Hardcastle* (*p*), *Griffith* v. *Harrison* (*q*), *Nicholl* v. *Nicholl* (*r*), *Wollen* v. *Andrewes* (*s*), and *Moneypenny v. Dering* (*t*), that the doctrine of *çy prés* is not more a doctrine of equity than of the common law. In these and other cases it has been admitted and applied by Judges soundly versed in the strict principles of the common law, in a manner which forbids as idle and unnecessary a detailed examination of the facts of the cases to prove that *çy prés* was recognised. "The doctrine of *çy prés*," observed the Court of Exchequer in the last mentioned case, "in reference to cases of Perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross-remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a Perpetuity. In such cases, the law, in order to prevent the testator's intention from being entirely

(*o*) See 2 Jarm. Wills, 731.
(*p*) 2 T. R. 241.
(*q*) 4 T. R. 737.
(*r*) 1 W. Bl. 1159.
(*s*) 9 Moo. 248; 2 Bing. 126.
(*t*) 16 M. & W. 418.

defeated, has treated his *expressed intention* as divisible into two parts: first, the intention that the first taker and his issue male, or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers. And the two intentions being thus ascertained, the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention, shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker." "The doctrine has been long recognised, and we should be unsettling land-marks if we were to call it in question."

The force of some of the authorities above referred to has been attempted to be explained away by the observation that the limitations were either not *remainders*, or were not limitations of *common law* estates. With regard to the latter point, it is sufficient to observe that the limitations either passed actual common law estates (as in *Nicholl* v. *Nicholl* and *Moneypenny* v. *Dering*), or were, for the purpose of ascertaining the opinions of common law Judges upon them, considered as limitations of estates at common law. As respects the other question, it is perfectly clear that in *Nicholl* v. *Nicholl*, although the first gift to the second son took effect by way of executory devise, the gift to the issue of the second son (which is the material point) was, in relation to the first gift, a remainder, and after the vesting of the executory devise would take place as such. So, again, the limitations in *Wollen* v. *Andrewes* and *Moneypenny* v. *Dering* were clearly remainders. But (irrespectively of the particular facts of the cases) what can be more conclusive than the undoubting reliance upon the doctrine of *cy prés* of such judges as Chief Justice De Grey and Sir W. Blackstone in *Nicholl* v. *Nicholl*, of such a judge as Mr. Justice Buller in *Robinson* v. *Hard-*

castle, of such a judge as Lord Kenyon in *Griffith* v. *Harrison*, and *Brudenell* v. *Elwes* (*u*), of such a judge as Lord Ellenborough in *Seaward* v. *Willock* (*v*), of such a judge as Sir John Bayley in *Mogg* v. *Mogg* (*w*), and of such a judge as Chief Justice Best in *Wollen* v. *Andrewes*. The point is too clear for serious contention (*x*).

Once more—the inference from the doctrine of *cy prés* is not to be explained away by treating it as a rule or doctrine of *construction* merely. In some sense it may be termed a rule of construction, because it assumes that an intention is shewn by the testator to give the property in a line of succession resembling that of an *estate tail*. But it is not a rule of construction simply, when it strikes out of the scheme of gift estates limited to certain classes of issue as purchasers, in a manner excluding altogether any argument that he intended to give the *prior taker* an estate tail. In fact, the whole basis and initiatory ground of the doctrine is, that estates are limited in clear terms by the will which, upon settled principles, are *invalid* as they appear in the will. Upon what ground invalid? Upon this only—that they are too *remote* under the Rule against Perpetuities.

That the force of these instances should be attempted to be explained away by invoking the aid of the *potentia remota et propinqua* doctrine, seems improbable, when it is considered that one and all or nearly all of them refer to "tendency to perpetuity," or "undue remoteness," as the evil against which the judges were employed in providing a remedy.

The alternative, then, unquestionably, is, between the rejection of the *cy prés* rule as an article of the common law, and the acceptance of the proposition that remoteness is an infirmity from which remainders are not exempt.

(*u*) 1 East, 451.
(*v*) 5 East, 204.
(*w*) 1 Mer. 688.
(*x*) See the judgment in *Vanderplank* v. *King*, 3 Hare, 12. *Hopkins* v. *Hopkins*, 1 Atk 580, is there mentioned to be one of the cases of legal devises, but this seems questionable.

An argument sometimes urged is, If remainders may be too remote, how is it that we do not discover the rule explicitly laid down in our books? It might be sufficient to reply to this question by preferring another, and asking, why the precise limits of the rule against Perpetuities were not settled until so recent a period as the year 1833? There can, however, be no difficulty in removing the supposed objection. In the first place, remainders were originally, as the Real Property Commissioners tell us (*y*), "considered encroachments on the common law," and resort to their creation was, consequently, rare and gradual. Then, after their introduction into common settlements, the simplicity universally characteristic of the dispositions of property, was incompatible with and precluded all attempt at those refined and complex schemes which alone give rise to our modern questions of perpetuity. And subsequently, when this strictness began to relax, the doctrine of double possibilities stepped in; the effect of which, as has been shewn, was, to discourage settlements upon objects or in events of an indefinite or unascertained character. Now, however, that our judicature and practitioners have ceased to be scared by hard names, but pay regard to the substance of the laws of alienation, and thus fall in with the bent of the times and the complicated demands of a refined state of society, dispositive schemes prevail, which necessarily induce questions unknown to and unanticipated by the lawyers of former times; although, had occasion arisen for affixing limits to the creation of remainders, prior even to the invention of executory uses and devises, we can entertain no doubt but that the same authority which adjudged it necessary that a contingent remainder should vest at the determination of the particular-estate, would have been equally within the legitimate scope of its functions, in ascertaining the due bounds of such future estates, with reference to the general policy of the law for securing freedom of alienation.

(*y*) 3 Rep. 23.

A question is from time to time raised in the Courts which it occasions surprise to find treated as in any way doubtful or open to argument. The doctrine that a life-estate may be limited to a person not *in esse*, whether the gifts subsequent to it are valid or invalid (*z*), seems so clear and sound, that to account for the opposite contention appearing in arguments at the bar in some recent cases, one is compelled to refer it to something recondite and obscure in the doctrine of Perpetuities, which darkens the view of the simple grounds upon which such a point rests. Is it not obvious that as an estate in fee may be well given, so a life interest may be well given, to persons not *in esse?* And that there can be no distinction in this respect between limitations of realty and of chattels? When we recollect that this point was laid down so long ago as the year 1789, by Lord Kenyon in *Hay* v. *Earl of Coventry* (*a*), and again in *Brudenell* v. *Elwes* (*b*), it is certainly surprising that it should have remained for the learned Judges in *Boughton* v. *James* (*c*), and *Williams* v. *Teale* (*d*), to extinguish finally this "vermiculate" question (as Lord Bacon (*e*) would have termed it). It is equally clear it can make no difference that in the series of limitations there are some gifts subsequent to the life-estate which are too remote; as if estates by purchase are given to the issue of the unborn child: for while those estates fail, the estate to the unborn child stands good (*f*).

As an instance of the doctrine (*g*), that when the remainder is dependent upon particular estates which, as being limited to persons *in esse*, will certainly expire within the limits of the rule, or upon estates tail, the remainder will be good, how indefinite and remote soever may be the terms or nature of the contingency upon which the remainder is to take effect, the

(*z*) Treat. Perp. 417, 423, 443. Clearly, the case of *Hayes* v. *Hayes*, 4 Russ. 311, is not law upon the point above mentioned.

(*a*) 3 T. R. 86.

(*b*) 1 East, 452.

(*c*) 1 Coll. 36, 46.

(*d*) 6 Hare, 250.

(*e*) Advancement of learning, book 1.

(*f*) *Beard* v. *Westcott*, 5 B. & A. 801.

(*g*) Treat. Perp. 422. Vide *supra*, p. 99.

case of *Wrightson* v. *Macaulay* (*h*) may be mentioned. In that case property was devised to B. for life, remainder to his sons and daughters in tail, remainder to C. for life, remainder to D. for life, remainder to his sons successively in tail, remainder to the male heir who should be in possession of and lawfully entitled for the time being unto the ancient estate at M. belonging to the H. family, for his life, remainder to the first and other sons successively of such male heir. Now, except as a remainder limited upon the preceding estates which have been mentioned, this limitation to the male heir would, without doubt, have been bad as not certainly to vest within the prescribed limits; but as, in its character of a remainder, it was supported by estates for life to persons *in esse*, and by estates tail the owners of which might have barred it, it was a good and effectual limitation, to take place or fail according to events at the determination of the preceding estates.

That gifts to be enjoyed by a line of heirs in succession in perpetuity, will sometimes be held to pass an estate of inheritance or the absolute interest to the first of the series of takers, upon a construction of the testator's general intention, without calling in aid the doctrine of *cy près* (*i*), may be seen by referring to *Thompson* v. *Thompson* (*j*); but the testator must be shewn to have intended an order or course of succession known to the law, or some line corresponding to a legal order of succession (*k*).

The case of *Nicholl* v. *Nicholl* (*l*), where the eldest son of the second son was excluded from any estate by purchase by the will, and yet that second son was held to take an estate tail by the rule of *cy près*, has been the subject of some forcible strictures in the judgment of the Court of Exchequer, in *Monypenny* v. *Dering* (*m*), shewing that it may be doubted

(*h*) 4 Hare, 487.
(*i*) Treat. Perp. 426.
(*j*) 1 Coll. 388.
(*k*) *Thomason* v. *Moses*, 5 Beav. 77.
(*l*) 2 Sir W. Bl. 1159.
(*m*) 16 M. & W. 436.

whether, even in a case precisely similar to *Nicholl* v. *Nicholl*, the Courts would follow that decision in applying the doctrine of *çy près* to such a case.

The case of *Pitt* v. *Jackson* (*n*) has been followed in *Vanderplank* v. *King* (*o*), but with the same objections on the part of the learned Judge to the soundness of the authority, which have been repeatedly felt and expressed by other Judges, and which appear likewise in the judgment in *Monypenny* v. *Dering*. Upon the whole, it seems likely that the decision in *Pitt* v. *Jackson* has become settled law.

The important case of *Vanderplank* v. *King* had not been reported when the former work was written; and the question is, whether the doubt there suggested (*p*) concerning the doctrine of that case is well founded. It seems that this case has decided, that where a gift is made to a class of children (some of whom may be born after the testator's death), as tenants in common, with remainder to all the issue of such children (as an entire class), as tenants in common, the children born in the lifetime of the testator, may be allowed to take an estate for life, with remainder to their issue as purchasers, but that the other children would take estates tail under the doctrine of *çy près*. The ground upon which this decision seemed open to remark was, that it appeared to conflict with the doctrine of Sir William Grant, in *Leake* v. *Robinson* (*q*), that a gift to a class including objects too remote, is void as to the whole class. As it was possible at the testator's death, that children might be born afterwards, the devise, by purchase, to the children of the children, clearly included objects too remote, and the possibility of such objects coming *in esse*, after the testator's death, rendered the gift to the entire class of grandchildren void for remoteness. This would be the state of the limitations anterior to any question concerning the manner and extent of the application of *çy près*. The whole gift was void, and not any part of the gift could, by possibility,

(*n*) 2 Bro. C. C. 51.
(*o*) 3 Hare, 12, 16.
(*p*) Treat. Perp. 453.
(*q*) 2 Mer. 363.

stand good. Now, if the doctrine of *çy près* could be applied to render valid a limitation, which upon settled rules is invalid, or to establish such a limitation in part, then it would be obvious that those members of the class, who became individually valid objects of gift, should be allowed to take, as purchasers, under the limitation, leaving the rest of the gift to be moulded into another form. But it seems clear that the doctrine of *çy près* does not ever produce validity in a gift which is otherwise illegal, but, on the contrary, proceeds upon the principle of sacrificing the invalid gift, in order to carry out the testator's general intent. It may be asked, how did the grandchildren born before the testator's death become entitled? If the answer should be, that they became entitled under *the gift;* the reply is, that that gift was wholly *void.* But if the answer should be, that they became entitled under the doctrine of *çy près*, that must be doubted, for the gift, so far as it affected them, was left precisely in its original state, which is incompatible with the notion that they took by *çy près.*

Undoubtedly, the Court is not required to alter more of the will upon the *çy près* principle, than the exigencies of the case call for: that doctrine should not be applied to any devise in the will, but those which demand its application, in order that the devise may be sustained. But, did not the *whole* devise to the issue of the children require the *çy près* principle, in order to sustain it? Was not the exigency of the case the invalidity of the gift to the *entire* class?

Had there been *several sets* of limitations distributively (or in effect and intention distributively) to the issue of each child, then clearly the principle of *çy près* would have been required only for those distinct shares of the property the devise of which, having regard to the circumstances at the testator's death, could not have effect in their unassisted form. But, it seems clear that the testator did

not give distributively an undivided share to the issue of such child.

Another difficulty which suggests itself is, that as the issue of the children were to take in one entire class, as tenants in common, it does not appear how the doctrine of *çy près* could be applied with reference to a portion only of the class, and at the same time the division of shares contemplated by the testator be adhered to. For, the share of every object of the gift, as well the valid as the invalid objects, depends upon the entire number of objects; and then how can we even profess to adhere to part of the gift, when we do not attend to the terms of it in regard to the interests of the devisees *inter se?* or, if we do attend to the terms of the gift in this respect, are we not compelled, for that very purpose, to advert to the invalid as well as the valid objects, which the law, in general, does not allow?

These were the considerations which led the writer in his former work (*r*) to suggest a question whether *Vanderplank* v. *King* was easily to be reconciled with previous authorities which, as was there observed, seem to shew that the rule of *çy près* effects no change in the ordinary rules upon the question of remoteness (*s*). Whether the grounds which have been stated are sufficient to support the doubt, others must decide, but the writer has been unable to convince himself that they are so far immaterial as not to deserve a place in the present Supplement.

The point, as will have been observed, which suggested doubts concerning the decision in *Vanderplank* v. *King*, was not that the Court looked at the state of the family at the death of the testator. The writer did, indeed, in that work treat the rule of law as not permitting such a proceeding, but he has already ventured to submit his views to shew that the learned Vice Chancellor who decided *Vanderplank* v. *King*

(*r*) Treat. Perp. 453. (*s*) Ib. 442.

was abundantly correct in holding the contrary doctrine on that subject. But it should seem that this question does not in any way enter into the consideration of *Vanderplank* v. *King*, for the state of the family appears to have been at the testator's death precisely what it was when he made his will; and, over and beyond this, there was the very important circumstance that, at the testator's death, it was not certain that the limitation in question would vest in all the objects within lives in being and twenty-one years.

The case of *Williams* v. *Teale* (*t*) very much resembles *Vanderplank* v. *King*. The testator directed his estates to be conveyed (in effect) to the testator's children equally between them, for their lives, with survivorship between them, and after the decease of the survivor of the children, then to the grandchildren born and to be born, equally between them, during their lives, with survivorship between them, and after the death of the survivor of the grandchildren, in case any of the grandchildren should leave children living at the time of the decease of the surviving grandchild, then to the testator's grandchildren born and to be born equally between them, as tenants in common in tail, with cross-remainders in tail between them. It seems that the testator left seven children surviving (the eldest of whom and his issue were excluded by the will from taking under the limitations which have been stated). One of the six younger children had one child at the death of the testator, and another had three children at that time; and several grandchildren were born after the testator's death. The only point actually decided by the Court, prior to a reference to the Master to approve of a settlement, was, that the children of the testator took estates for their lives only; but the learned Judge added that in his view the grandchildren took estates tail general by purchase, as tenants in common, with cross remainders between them

(*t*) 6 Hare, 239.

in tail, with an ultimate limitation failing the estates tail so limited. The question is, whether this intimation from the Court that *all* the grandchildren would take estates tail, follows out the rule of *Vanderplank* v. *King*, or whether it does not rather sanction the views which have been suggested to shew that, in the latter case, all the children of the testator's daughter should have been held to take estates tail, with remainders by purchase to their children. For the four grandchildren of the testator in *Williams* v. *Teale*, who were born in his lifetime, appear to have occupied precisely the same situation as the three grandchildren (children of Jane King the testator's daughter) who were living at the death of the testator in *Vanderplank* v. *King*. The grandchildren of the testator, in each case, were tenants in common for life under the will, and in each case the remainder was to *all* their children, in one *entire* class, as tenants in common. If the circumstance of the three grandchildren in *Vanderplank* v. *King* being born before the testator's death, was sufficient in *Vanderplank* v. *King* to preclude the application of the doctrine of *çy près* to that portion of the ulterior remainder which included their children, would not the corresponding circumstance equally avail to preserve the estate for life of the four grandchildren who in *Williams* v. *Teale* were born before the testator's death? There is, however, one point in the limitation to the great-grandchildren in *Williams* v. *Teale*, which suggests a distinction between that case and the earlier one. It has been stated that the gift to the great-grandchildren was introduced by a clause to the effect—"in case any of the grandchildren should leave children living at the time of the decease of the surviving grandchild." Whether the Court considered this to have the effect of placing the gift to every one of the great-grandchildren so far in *contingency*, as to preclude the application of the doctrine of *Vanderplank* v. *King*, in which there was no such clause, the report does not inform us; but it may be doubted whether,

having regard to the terms of the gift to the great-grandchildren, (which included *all* of them, whether surviving the grandchildren or not,) the Court intended at all to advert to this clause as furnishing a peculiarity in the case: for it may with reason be contended that the clause in question would not prevent the *vesting* of the gift to the great-grandchildren (supposing it could have effect). Another circumstance of distinction between the two cases is, that in *Vanderplank* v. *King*, the gift was to vest in possession in the great-grandchildren, as the respective grandchildren should die; whereas in *Williams* v. *Teale* the limitation of the inheritance was to take effect in possession on the decease of the last surviving grandchild (there being gifts to the children of each grandchild in the meantime, but which were substitutionary and confined to the annual income merely). This difference, however, appears not to touch the essential point, which is, that the great-grandchildren were to take as one entire class in both *Vanderplank* v. *King* and *Williams* v. *Teale*.

In conclusion, it is submitted that the case of *Williams* v. *Teale*, in giving estates tail by *çy près* to all the grandchildren of the testator, including as well those born before as those not born until after, the death of the testator, is free from those doubts which arise respecting *Vanderplank* v. *King*, where (as it should seem, without any distinction that can be deemed essential) some of the grandchildren were restricted to estates for life, while others were made tenants in tail upon the *çy près* principle.

It remains to speak of the case of *Moneypenny* v. *Dering* (*u*), as an important decision upon the practical application of *çy près*. It bears out the observation in the former work (*v*) that the doctrine of *çy près* is not to be *extended*. In that case an estate for life was devised to P. M., with remainder to his first son for his life, with remainder to the first son of such first son, and the heirs male of his body, and in default of such

(*u*) 16 M. & W. 418.

(*v*) Treat. Perp. 453.

issue to all and every other the son and sons of the body of P. M. successively for the like interests and limitations as were before directed respecting the first son and the issue of his body. The Court observed, no estate was given to any other grandson of P. M. except the eldest son of each of his sons; and that, consequently, it was no part of the testator's intention that the male descendants *generally* of P. M. should take the estate, but only a very small part of those descendants, namely, the eldest direct line tracing from each of his sons, and that eldest line only. The Court further said, that to hold that the sons took estates tail male, would be not to effectuate a general, at the sacrifice of a particular intention, but arbitrarily to force on the testator an intention different from that which he had expressed: and that *Nicholl* v. *Nicholl*, and *Pitt* v. *Jackson*, (the cases which had carried the doctrine the furthest) not being precisely similar to the case before the Court, and the Court not feeling inclined to carry the doctrine on which they rested one step further, those cases did not warrant the construction that the sons of P. M. took successively estates in tail male. Consequently, the limitations subsequent to the gift to the first son of P. M. were void for remoteness. This case is a valuable authority, as helping to define the precise limits to which, in practice, the rule of *çy près* can safely be carried; for it embodies tangibly and gives point to the general floating disinclination of the Courts to apply beyond the bounds previously authorized, the doctrine of *çy près*.

The case of *Boughton* v. *James* (*w*) is another case to shew that the doctrine of *çy près* ought not to be extended. In this case the will, as the learned Judge pointed out, did not in terms give or affect to give an estate tail to any person born or unborn, and the dispositions in it related to a mixed fund of real and personal property. The Court said, the doctrine had gone at least far enough, and that it was not capable of being applied to the provisions in question. It is deserving

(*w*) 1 Coll. 26, 44.

of notice that in this case the Court expressly avoided saying, whether (according to the doctrine upon that point suggested in the former work (*x*)) *çy près* ought to be brought to bear, in any case, upon the disposition of a mixed fund of real and personal estate. That question, therefore, remains in the state indicated in the book just now referred to. But it is believed that this point may possibly require decision in the before mentioned case of *Williams* v. *Teale*, in a future stage of it.

(*x*) Treat. Perp. 437.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS LIMITATIONS TO CLASSES OR ASSOCIATIONS OF PERSONS.

THE rules stated upon this subject in the previous work (*a*) are confirmed by the subsequent decisions.

Thus, limitations to grandchildren or others as a class possibly including remote objects, will be found to have been held void, in the whole, in the cases of *Bull* v. *Pritchard* (*b*), *Comport* v. *Austen* (*c*), and *Blagrove* v. *Hancock* (*d*). In *Early* v. *Benbow* (*e*) the same point arose, although an actual decision upon it was not necessary.

In this class of cases, the Court will sometimes find ground for the construction that a testator, when referring to children (of a person *in esse*), whom he makes tenants for life, with remainders by purchase to their issue, intends to speak, in the first gift, of those children who are living at the date of the will, or at the time of his death, and no other; the consequence of which construction is, that the ulterior gift to the issue of those children is valid, as not extending to any objects possibly too remote. This was the case of *Leach* v. *Leach* (*f*), where the testator bequeathed personalty to trustees upon trust, after the decease of his wife or upon her subsequent marriage, and after the death of his brother and sister, to pay the dividends and interest "to and for the use and benefit of E. R., the eldest daughter of the testator's brother, J. R., and the other children of his said brother," in equal shares, for their lives, and the

(*a*) Treat. Perp. 456.
(*b*) 5 Hare, 567.
(*c*) 12 Sim. 218.
(*d*) 12 Jur. 1081.
(*e*) 2 Coll. 342, 354.
(*f*) 2 Y. & C. (C. C.) 495.

principal to be divided amongst all and every the lawful issue of the said E. R. and the other children of the testator's brother, in equal shares, and to be assigned and transferred to them upon their severally attaining twenty-three. The testator's brother survived him, and at the date of the will had two children besides E. R. The Court held that, according to the true construction of the instrument, there was no illegality, and that the testator must be taken to have meant only the three children then living of his brother, or at least not to have intended to include any child that might come into existence after the testator's decease. The three children, therefore, took life interests, and their children became entitled in possession after them. This was also the doctrine of *Elliott* v. *Elliott* (*g*), where the gift was "unto and among all and every the children, sons and daughters of his daughter, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years." The Court held that the testator meant those children who were then living, or might be living at his death, and that, so regarding the gift, there was no objection to it. In this case, the gift to the children was *immediate*, no prior life interest being given; and in such cases the presumption always is, that the gift was intended to take effect on the testator's decease, so that those alone who, at that time, come within the description specified, constitute the class entitled to take as legatees.

Another rule suggested by the recent cases, and with obvious reasons to support it, is, that where separate sums or legacies are given to individuals belonging to a class, the whole is not void merely because the class includes persons to whom the gift is ineffectual, on the ground of remoteness. This point arose in *Boughton* v. *James* (*h*), where there was a trust to pay to and for the use and maintenance of each of the daughters of the testator's two nephews, whether born in his lifetime or after-

(*g*) 12 Sim. 276.

(*h*) 1 Coll. 26. See the statement of the decree in 1 Ho. L. Ca. 414.

wards, the yearly sum of 40*l.* a-piece, until they should respectively attain the age of twenty-five, or be married with the consent of their parents, or surviving parent, and on their respectively attaining that age, or being previously married with such consent, in trust to pay to each of them the sum of 1500*l.*, for their respective uses and benefit. The two nephews had daughters living at the death of the testator, and also daughters born subsequently. It was contended that the legacies of 1500*l.* were valid as to the daughters born in the lifetime of the testator, as being distinct legacies to individuals, and not a gift to a class. The Court held, that a daughter of one of the nephews not coming into existence until after the testator's death, could not claim a legacy under the will, but that the daughters who came into existence before the testator's death, were entitled to their legacies; or, at least, the inclination of the Court may be said to have been favourable to the claim of such daughters. The same point was suggested in the case of *Early* v. *Benbow* (*i*), where the gift was "to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining twenty-one." The only question decided was, that certain grandchildren of a brother of the testator living at the date of the will, and for whom express provision had been already made by it, were not entitled to claim anything under the clause which has been stated. The Court left undecided the point whether or not the clause was wholly void. Supposing, however, the rule above suggested to be a valid one, it should seem that it would not be necessary to adopt the conclusion that the gift to each grandchild of 500*l.*, would be void as to *all* the grandchildren (whether actually capable of taking within the prescribed limits or not). But if these cases have left the point at all open to argument, it seems that the case of *Griffith* v. *Pownall* (*j*) has settled it in the affirmative. In this

(*i*) 2 Coll. 342, 347. (*j*) 13 Sim. 393.

case the children of Mr. and Mrs. P. were objects of a gift in default of appointment by E. H. under a power to appoint in favor of those children and their issue limited by a settlement. At the date of the settlement there were five children living. E. H. by his will appointed that the shares of the fund which "such of the children of Mr. and Mrs. P. begotten or to be begotten, as were or should be daughters," would be entitled to in default of appointment, should remain vested in the trustees, upon trust to pay the dividends to the daughters for life, according to their respective shares of the capital, and that after their deaths *their shares* should be transferred unto and equally between all their children respectively. The question was raised on behalf of Mrs. F., one of the children of Mr. and Mrs. P., and who by the appointment was restricted to a life-interest. The Court held that if there had been *other* children born to Mr. and Mrs. P., the appointment would have been bad as to the children of *such other* children, but nevertheless the appointment, as to Mrs. F.'s share, would have been good; for the partial invalidity of the appointment with regard to the shares of her younger sisters, could not affect, in the slightest degree, the validity of the appointment of her share. The principle of this decision, though pronounced upon the case of an *appointment* under a power, is conceived to be applicable no less to an original gift of *several* sums, or of *divided* portions of an entire sum, to the *individual* members of a class.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS LIMITATIONS TO PERSONS ANSWERING A CERTAIN DESCRIPTION, OR POSSESSING A SPECIFIED QUALIFICATION.

THE doctrine of law (*a*) that where limitations are made to individuals unascertained, by reference to some qualification or description which will not necessarily be satisfied or fulfilled before the expiration of lives in being and twenty-one years, the gift is void (no less than if made to individuals unborn, and who may not come into existence within the necessary period), applies also where gifts are made to depend or take effect upon the death of a person referred to under a description or qualification not certain to be confined to individuals *in esse*. Thus, in *Hodson* v. *Ball* (*b*), there was a gift of real and personal estate, upon trust to pay an annuity to the testator's wife, and subject thereto upon trust to divide the income between the testator's six children by his former wife and all his children by his then wife, equally, and in case any of the children should have issue, and such child or children and his her or their issue should all die *in the lifetime of any husband or wife with whom any of the children should have intermarried*, then the share and shares of such children should go unto the other then surviving children and to the issue of such of them as should be then dead. The Court having first held that the children took estates in fee-simple in the real property, and absolute interests in the personal property, decided also that the gift-over in case of the death of any of the children and their issue in the life of the husband or wife of such child or children, was too remote,

(*a*) Treat. Perp. 464. (*b*) 14 Sim. 558.

because as any one of the testator's children might have married a person who was not born at the time of the testator's death, the gift-over was not confined to a life in being at the testator's death and twenty-one years after. In this respect, *Hodson* v. *Ball* is an example of an important class of cases, in which the mistake is not unfrequently made of limiting gifts-over upon contingencies connected with the lives, not merely of previous legatees who are actually in existence, but also of their wives or husbands to whom interests in remainder may (or may not) be given, and who, it is obvious, may, by possibility, prove or turn out to be persons not born at the time when the gifts were made.

A case of great importance in every way has been lately decided in the House of Lords, which is referrible entirely to the doctrine concerning gifts to unascertained persons. The case alluded to is *Lord Dungannon* v. *Smith* (*c*), where the testator bequeathed certain leaseholds for years in trust for his grandson, A. T., for his life, "and from and after his decease, to permit such person who for the time being would take by descent as heir male of the body of the said A. T., to take the profits thereof until some such person shall attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns; but if no such person shall live to attain the age of twenty-one years," then over. A. T. attained twenty-one soon after the testator's death, and the heir male of his body attained twenty-one before the death of A. T. After the decease of A. T. the persons representing the next of kin of the original testator, claimed the property on the ground that the bequest of the leaseholds after the death of the grandson was void for remoteness. The Master of the Rolls in Ireland allowed this argument by overruling the demurrer of the defendant who was the son and heir male of A. T., and who had entered into possession of the

(*c*) 12 Cl. & Fin. 546; mentioned in Treat. Perp. 473.

leaseholds. The case went, by appeal, to the House of Lords, where opinions *against* the validity of the bequests subsequent to the gift to the grandson, were delivered by the following judges, viz, Tindal, C. J., Williams, Coltman, Maule, Wightman, and Cresswell, J. J., and Alderson, Rolfe, and Platt, B. B. Parke, B., and Patteson, J., thought the gifts in question *valid.* The House held that the gift of the *corpus* of the estate, and the disposition of the intermediate rents, were entirely unconnected with each other, and that the disposition of the rents and profits to particular individuals under the will, no more affected the disposition of the *corpus* of the estate, than if it had been to mere strangers. And the House held further, that as it was originally *possible* that, at the time of the death of the grandson, the person next answering the description of heir male under the will, might be a minor, and might never live to acquire the estate by attaining twenty-one, and as it would not be certain that *any* person would answer the description within twenty-one years after the death of the grandson, the gifts ulterior to the grandson's life estate entirely failed.

This case is remarkable for an energetic attempt made in the argument to put a particular and forced construction upon the will, in order to obviate the difficulties arising out of the law against Perpetuities. It was urged that it might be inferred from the will, that the testator intended to create *successive estates* to each and every person from time to time coming within the description of heir male of the body of the grandson, so as to bring the case within the principle that where the first in order of a succession of distinct estates, is not void for remoteness, it is good, although the subsequent estates should be void. But the House, in very strong terms, repudiated this construction, which, as Lord Chancellor Lyndhurst observed, would be making a perfectly new will for the testator, for the purpose of getting out of the difficulty arising out of the Law of Perpetuities. His lordship most forcibly pointed out that the same principle would apply to

almost every case in which the Court had decided against the validity of a bequest in respect of its remoteness—that it would "break down all the decisions upon this subject;" and would "remove all those landmarks of the law" which had been for some time considered as firmly established.

Long, laboured and ingenious as were the arguments in this case, and anxious as was the attention given to it by the House and the Judges, there was not, in truth, any peculiar difficulty in it. Its importance to the interests of the parties immediately concerned led to great efforts to sustain the disposition; but the principle and the application of it were clear: and the House of Lords has rendered signal service to the jurisprudence of the country in withstanding the bold attempts made in this case to introduce refinements upon settled rules, which, had they been conceded to the smallest extent, would have let in upon the whole law of Perpetuities a flood of doubt and litigation, better than which it would be that there should not exist any Rule at all against Perpetuities.

It may be fit to bear in mind the suggestion in the former work (*d*), that the doctrine of *Lord Dungannon* v. *Smith* would not apply to a *legal* limitation of *real* estate of the character of the gift in that case.

With reference to the class of cases (*e*), where interests are attempted to be limited in succession to a line of persons in right of their ownership or proprietorship of some other property, but in such a manner that the individuals successively answering the description cannot be pointed out or ascertained, or their interests vest, before the period of their actually becoming entitled in possession, the case of *Harvey* v. *Harvey* (*f*) may be mentioned. In that case real estate was given after the death of the testator's wife to the eldest son of J. H., and the eldest son of E. H., equally, during their lives, with remainder to the second, third, and other sons of J. and E. H. in tail male; and the testator directed the trustees, after his

(*d*) Treat. Perp. 474. (*e*) Treat. Perp. 475. (*f*) 5 Beav. 137.

wife's death, to apply the income of his personalty unto and amongst the children and grandchildren of J. H. and E. H., *who should not from time to time* be in receipt of the rents of the freeholds devised. It was contended that, as the division was to be from time to time between parties who must be ascertained *de anno in annum*, and would not be necessarily born within the limited period, the gift was void for remoteness. The Court considered the words "from time to time" occasioned considerable ambiguity, but, as there might in fact be a succession of rights *anterior* to the time of division, they might be explained to refer to such circumstances only. And the Court accordingly held that the words were intended to describe a class of persons existing at the death of the widow, the tenant for life, and not a class to take *in succession*. The question, therefore, whether the alternative of holding the gift bad for remoteness in such cases, may not be avoided by giving the absolute interest to the first taker, or the first series of takers, is not assisted by the decision in this case.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS UPON EVENTS OF INDEFINITE OCCURRENCE.

THE class of cases (*a*) where a gift is made to take effect upon the occurrence of an event not certain to happen, if at all, within twenty-one years after lives in being at the time of the creation of the gift, is exemplified by one of the bequests in *Boughton* v. *James* (*b*), where limitations were made to take effect, "when and so soon as any son of either of my nephews John B. and Joseph B., shall have attained the age of twenty-five years." John B. and Joseph B. survived the testator; and, because the event might remain possible and not happen during the compass of all lives in being at his death and more than twenty-four years afterwards, the Court held that the gifts were illegal and void. And this decree was affirmed by the House of Lords (*c*).

So, in the case of *Hodson* v. *Ball* (*d*), a gift-over upon the death and failure of the children and their issue in the lifetime of any husband or wife with whom such child or children should have married, was held too remote, since the person in whose lifetime the event in question was supposed to take place, was referred to as filling a certain character ("husband" or "wife,") which would not necessarily be sustained by a person *in esse* only, but might be answered by a person unborn at the time of the creation of the limitations.

So, in the case of *Lord Dungannon* v. *Smith* (*e*) there was a

(*a*) Treat. Perp. 478.
(*b*) 1 Coll. 26.
(*c*) 1 Ho. L. Ca. 406.
(*d*) 14 Sim. 558.
(*e*) 12 Cl. & Fin. 546.

gift-over, following upon the limitation to the heir male of the body of A. T. who should attain twenty-one, "if no such person shall live to attain the age of twenty-one years." It is clear that, just as the intermediate limitation was void in respect of its being made to an unascertained person who would not necessarily be ascertained within the prescribed limits, so this gift-over was void as contemplating an event of indefinite occurrence, namely, a default of the object of the previous indefinite gift.

In connexion with the subject of provisions to take effect upon contingencies of indefinite or remote occurrence, it may be mentioned that the case of *Boughton* v. *James* (*f*) supports the proposition (*g*) that remoteness in a contingency upon which the interest under a gift is to determine, does not interfere with the operation of such determining clause. In that case, the interests under the will of certain parties some of whom might not be *in esse* at the testator's death, were so limited as to expire on their respectively attaining twenty-five, and the Court held that these trusts and bequests were valid and ought to be carried into execution. But the ground of this doctrine should be understood. It is conceived that the determination of a gift on a person unborn attaining twenty-five, is not to be sustained on the ground that as such unborn person may take an estate for his life, so any event connected with him which must take place, if at all, during his life, may lawfully be contemplated, as not exceeding the compass of his life. This would lead to the doctrine that any *executory gift* is valid which is so made as to take effect upon an event necessarily to happen, if at all, during the life of the unborn person; but such a doctrine would clearly be unsound. Therefore, it is not because the contingency is included in the compass of a life, for which life an estate may be limited, that the determin-

(*f*) 1 Coll. 26; see the decree stated in 1 Ho. L. Ca. 414.

(*g*) *Vide supra*, p. 65.

ing clause may be considered valid; but its validity rests simply upon this,—that the doctrine of remoteness does not apply to that part of a gift which merely ascertains and marks out the limits of its duration, but that it applies only to regulate the time of its taking effect or commencement. The qualification, however, must be always borne in mind, that this view cannot with safety be entertained concerning a determining clause, or clause of cesser, which is separate and distinct from the original gift; it applies only to that which forms, by the very terms and constitution of the limitation, its natural boundary.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES, AS IT AFFECTS POWERS OF APPOINTMENT, AND LIMITATIONS IN PURSUANCE OF THEM.

THAT a particular power may embrace objects of any degree of remoteness (*a*), may be seen by referring to *Griffith* v. *Pownall* (*b*), and *Thomas* v. *Thomas* (*c*).

It has always been considered that a power which comprises objects, some of whom would be too remote as direct objects of gift, is not on that account a void power as to such objects, but that it is simply incumbent upon the donee of the power, to take care, in his appointment, to limit no interest which would have been illegal, if placed in the instrument creating the power (instead of such power). In this respect, *Thomas* v. *Thomas* is a case which appears not conformable, in its doctrine, to preceding authorities. The power in this case was limited by a marriage settlement, and comprised children of the marriage and the issue of such children as should be living at the decease of the survivor of the husband and wife. There were four children of the marriage, three of whom, R., J., and C., survived both father and mother. An appointment was made of particular portions to R. and J., and of another portion to C. for her life, and after her decease *to her children.* By a codicil to the will which contained the appointment, it was mentioned that R. S. was then "the only surviving child" of C. It was contended that the appointment to C. for her life and after her decease to her children, was void, except as to C. The Court having, upon the construction of the power, come to the conclusion that there was nothing to limit the

(*a*) Treat. Perp. 487. (*b*) 13 Sim. 393.
(*c*) 14 Sim. 234.

generality of the word "issue" in the power, added,—"and, consequently, the power is void, so far as it relates to the issue." And, accordingly, the appointment attempted to be made in favor of R. S., was held void. Now, treating the appointment as including all the children of C., whether born in the lifetime of the appointor, or at any time after his decease, there can be no question that the appointment under which R. S. claimed was void. But it is submitted that, upon all principle, the *power* was wholly valid; for if the power is so constructed as to enable the donee of it to make an appointment which will not be too remote, the whole power is valid, and the only question to be decided is, whether the appointment be legal.

The importance of the distinction which has been now adverted to, is seen by reference to the circumstances of the very case upon which these observations have been made. It has been mentioned that R. S. was named in the codicil as a child then living, and the only surviving child of C. The appointment, it is true, made by the will, comprised all the children of C., and that appointment cannot be considered to have been altered by the codicil. But, suppose that the appointment by the will had been in fact made to R. S., the then "only surviving child" of C. In such case there is ground to contend (*d*) that the appointment being to an object so described in it as that if the *terms* of the appointment were placed in the instrument creating the power, he would not have been precluded from taking under that instrument, the appointment to R. S. would not be void. But, how could this doctrine prevail if the original power, so far as it comprised the class of which the supposed appointee was one, were necessarily to be held void. It seems clear that the received doctrine is correct, that a power need not be restricted to a class, all the members of which would be valid objects of a gift made in a direct form, by the instrument

(*d*) Treat. Perp. 490.

creating the power. This doctrine clearly had the sanction of the learned Judge who decided *Thomas* v. *Thomas*, in the case of *Griffith* v. *Pownall* (*e*).

The doctrine that where a gift under a power, exceeds the boundary of Perpetuity, if the portion in respect of which there is excess be definite, and can be separated from that in respect of which there is no excess, those objects of the power in whose favor there is a valid appointment, may take the shares destined for them, while the residue devolves as unappointed, received application in (a case of a somewhat novel description) *Griffith* v. *Pownall*. The power extended to the "children of P. begotten, or to be begotten, and the issue of such children." The appointment merely directed that *the shares* which such of the children of P. begotten or to be begotten as were daughters would be entitled to in default of appointment, should go to the respective daughters for life, and afterwards to their children respectively. The Court held that the appointment was not made collectively to persons, some of whom were not within the rule of law, but merely directed how *the share* of each daughter should go after her death, and, consequently, a partial invalidity of the appointment, with regard to the shares given to the issue of children not born at the time of the creation of the power, would not affect the validity of the appointment as to the shares given to the issue of children who at that time were *in esse*.

(*e*) 13 Sim. 396.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS LIMITATIONS ON ALTERNATIVE CONTINGENCIES, OR CONTINGENCIES WITH A DOUBLE ASPECT.

THE general doctrine that if a limitation is made dependent on the happening of either of two events, one of which is too remote but the other is not, it will take effect if the latter event happens (*a*), is supported by the case of *Minter* v. *Wraith* (*b*).

And the application impliedly of this general doctrine, in every case where personalty is given upon the event of the failure of a preceeding limitation to an unborn child, and the heirs of his body (*c*), is seen by the cases of *Bartlett* v. *Green* (*d*), *Earl Verulam* v. *Bathurst* (*e*), *Boydell* v. *Golightly* (*f*), and *Potts* v. *Potts* (*g*).

(*a*) Treat. Perp. 501.
(*b*) 13 Sim. 52.
(*c*) Treat. Perp. 509.
(*d*) 13 Sim. 218.
(*e*) 13 Sim. 388.
(*f*) 14 Sim. 327.
(*g*) 3 Jo. & La. T. 353.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS LIMITATIONS WHOSE POSSESSORY ENJOYMENT IS POSTPONED BEYOND THE PERIOD OF VESTING.

THE general doctrine, that where the effect of applying a settled rule of construction in regard to the vesting of limitations, will be to defeat the particular gift, that circumstance will not be sufficient to *exclude* such construction, if, in a similar case, where remoteness did not come in question, it would have been, without doubt, admitted (*a*), is upheld by the cases of *Leach* v. *Leach* (*b*), *Boydell* v. *Golightly* (*c*), and *Boughton* v. *James* (*d*), and by the opinions of Mr. Justice Patteson and Mr. Justice Maule and other judges, and the judgment of the House of Lords, in the case of *Lord Dunganon* v. *Smith* (*e*).

But, at the same time, the cases of *Leach* v. *Leach* and *Boydell* v. *Golightly*, shew that a will is to be read with an inclination to believe, when it can be not unreasonably supposed, that the testator did not intend to transgress the law (*f*).

There are several cases recently decided, in which limitations have been held void for remoteness, by reason of the construction prevailing that the *vesting*, and not the enjoyment merely, of the interests of the legatees, was postponed (*g*), namely, *Bull* v. *Pritchard* (*h*), *Boughton* v. *James* (*i*), *Comport* v. *Austen* (*j*), and *Blagrove* v. *Hancock* (*k*).

(*a*) Treat. Perp. 517.
(*b*) 2 Y. & C. (C. C.) 495, 499.
(*c*) 14 Sim. 344.
(*d*) 1 Coll. 26.
(*e*) 12 Cl. & Fin. 578, 588, 625.
(*f*) 2 Y. & C. (C. C.) 499.
(*g*) Treat. Perp. 518.
(*h*) 5 Hare, 567.
(*i*) 1 Coll. 26; 1 Ho. L. Ca. 406.
(*j*) 12 Sim. 218.
(*k*) 12 Jur. 1081.

There are also several cases where the construction which obtained, was that of an immediate or *valid vesting*, with a postponed *possession* merely, and where, on that account, the gifts were accordingly held valid, namely, *Jackson* v. *Marjoribanks* (*l*), *Greet* v. *Greet* (*m*), *Davies* v. *Fisher* (*n*), *Marquis of Bute* v. *Harman* (*o*), and *Milroy* v. *Milroy* (*p*).

The cases of *Elliott* v. *Elliott* (*q*) and *Leach* v. *Leach* (*r*), shew that the question, whether the vesting or the enjoyment merely is postponed, may be rendered immaterial by the construction that the testator, in the class referred to by the gift, contemplated objects living and to be ascertained *at the time of his decease*, and not any coming *in esse* afterwards.

(*l*) 12 Sim. 93.
(*m*) 5 Beav. 123.
(*n*) 5 Beav. 201.
(*o*) 9 Beav. 320.
(*p*) 14 Sim. 48.
(*q*) 12 Sim. 276.
(*r*) 2 Y. & C. (C. C.) 495.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS THE IMPLICATION OF ESTATES.

THE application of the important doctrine, by which limitations that would otherwise violate the Rule against Perpetuities, are rendered valid by the implication in a prior taker of an estate-tail, from words introducing a gift-over, will be seen by referring to the various cases quoted and observed upon in the chapter concerning limitations upon a failure of heirs or issue (*a*).

That the law will not raise *by implication* any estate which would be *void* for remoteness, under the Rule against Perpetuities (*b*), is confirmed by the case of *Monypenny* v. *Dering* (*c*).

(*a*) *Vide supra*, pp. 68—96. (*b*) Treat. Perp. 570.
(*c*) 16 M. & W. 427.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS EXECUTORY TRUSTS.

THE doctrine of the Court of Chancery that a trust, in point of intention and structure executory, though it embrace a class some of whom would be too remote as objects of direct gift, is to be carried out by a strict settlement in furtherance as far as may be of the intention, and so as not to limit estates which would be invalid on the ground of remoteness (*a*), is exemplified by the cases of *Trevor* v. *Trevor* (*b*), *White* v. *Briggs* (*c*), *Boydell* v. *Golightly* (*d*), *Tennent* v. *Tennent* (*e*), and *Boswell* v. *Dillon* (*f*).

The same cases shew that where the executory trust is limited by *deed*, the lives to be taken as the basis of the period of strict settlement, are those of persons living at the date of the deed creating the executory trust, and not those who may be *in esse* at the execution of the settlement by which the trust is carried into effect (*g*).

Some further observations bearing upon the subject of executory trusts will be found in a succeeding page, where limitations of chattels to descend as heir looms are spoken of.

(*a*) Treat. Perp. 575.
(*b*) 13 Sim. 108; 1 Ho. L. Ca. 239.
(*c*) 15 Sim. 17.
(*d*) 14 Sim. 346.
(*e*) Drury, 161.
(*f*) Drury, 291.
(*g*) Treat. Perp. 585.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS TRUSTS FOR ACCUMULATION OF INCOME.

THE general doctrine that trusts or directions for accumulation, expressly or possibly extending over a longer period than that allowed by law for the limitation of future estates, are wholly void, was recognised in the cases of *Elborne* v. *Good* (*a*), *Crosse* v. *Glennie* (*b*), and *Boughton* v. *James* (*c*).

Since the publication of the main Work, an important case has been decided on the subject of remote trusts of accumulation, which suggests questions of the greatest interest and importance.

In *Browne* v. *Stoughton* (*d*), J. B. devised lands to trustees upon trust for G. B. during his life, remainder upon trust for his first and other sons successively in tail male, with remainders over, and the will contained a proviso that if any person for the time being beneficially entitled to the possession, or to the receipt of the rents of the estates devised, should be under the age of twenty-one years, the trustees should, so long as the person entitled as aforesaid should be under the age of twenty-one years, receive the rents, and apply a competent part thereof for his or her maintenance, and invest the residue of such rents in the names of the trustees, and from time to time receive the income of the investments, and again invest the same, to the intent and so that the same might accumulate in the nature of compound interest, and should stand possessed of such surplus of the rents to be received during the minority

(*a*) 14 Sim. 165.
(*b*) 2 Y. & C. (C. C.) 237.
(*c*) 1 Coll. 26.
(*d*) 14 Sim. 369; 10 Jur. 747.

of the person for the time being entitled in possession, together with the accumulations thereof, upon trust to invest the same from time to time as opportunities should offer in the purchase of freehold or copyhold estates, which should be forthwith settled to the uses, and upon the trusts thereby limited and declared concerning the estates thereby devised, or as near thereto as circumstances would admit of. G. B. was an infant at the testator's death, and during G. B.'s minority the trustees laid out the rents of the estates, after providing for his maintenance, in the purchase of freehold estates which were settled upon the same trusts as were declared by the will of the devised estates. Upon a suit instituted by G. B. the question was, whether the trusts and directions contained in the will for the accumulation of the surplus rents during the minority of the person for the time being entitled, were void for remoteness, and whether G. B. was absolutely entitled to the purchased estates. In support of G. B.'s claim to that effect, the cases of *Ware* v. *Polhill, Lord Southampton* v. *Marquis of Hertford,* and *Marshall* v. *Holloway* were cited; and on the other side it was contended that there was a distinction between the cited cases and that before the Court, in that the *destination* of the accumulated *fund* in *Southampton* v. *Hertford,* and *Marshall* v. *Holloway,* transgressed the law against Perpetuity, whereas in *Browne* v. *Stoughton* there was not any vice in the destination of the *fund.* The decision of the Court was, that the trust for accumulation was wholly void, and that G. B. was entitled to the rents of the devised estates from the death of the testator, and to the estates which had been purchased with those rents. The ground of the decision was, the possibility that the trusts might go on without limit; and the Court considered there was no distinction between the case under consideration, and *Southampton* v. *Hertford* and *Marshall* v. *Holloway,* which, the Court said, were not determined with reference to what was to be done with the *fund* accumulated, but on the ground that the raising of the fund itself was illegal.

The case was considered by the Court to be a very simple one, the counsel for G. B. not being called on to reply; but the writer believes the statement made by the counsel interested in supporting the trust, to be perfectly correct, when they said that a decision against the trust for accumulation in that case would be a decision of the first impression, and one for which the cases cited on behalf of G. B. did not afford any authority. With the greatest possible respect for the opinion and judgment in such a case of the Vice Chancellor who decided *Browne* v. *Stoughton*, the writer has been unable, after repeated and anxious consideration, to remove the doubts which, from the moment of his first acquaintance with this decision, appeared to him to obstruct its reception as a valid authority.

That the clause of accumulation and investment of rents during minorities in *Browne* v. *Stoughton*, would have been illegal in any settlement or will which did *not* limit estates-tail to the objects of it, is perfectly clear. But, as the will in that case did contain limitations in tail to the issue of the tenant for life, the question is, whether that circumstance furnishes a material distinction, so as to render valid a provision which, without the estates-tail, would have been void.

Now, it is apprehended that, at the present day, it must be idle to enter into an argument to shew (*e*) that the general rule of our law is, to uphold, as not being a Perpetuity, every executory limitation which is engrafted upon, or limited in defeazance of an estate-tail (*f*). Between limitations in fee-simple and in fee-tail there is the essential distinction, that (although the latter are of inferior rank) there is incident to every estate-tail a right to put an end to or destroy all limitations and estates created either in defeazance of or by way of remainder after the estate-tail. To an estate in fee-simple no such power is incident, for whatever executory gift is engrafted upon it will infallibly arise and take effect, if the event happen

(*e*) Treat. Perp. 663.

(*f*) *Gulliver* v. *Ashby*, 4 Burr. 1929; *Nicholls* v. *Sheffield*, 2 Bro. C. C. 215; *Attorney General* v. *Milner*, 3 Atk. 111.

on which it depends, and that event be not too remote. This is a distinction which touches upon the essential ingredients of a Perpetuity. It belongs to the essence of a Perpetuity that it is indefeasible—that there is nothing but the contingency in the event on which it is limited, to render otherwise than certain the prospect of its actually arising. Therefore, the law steps in and says, that the event shall be a proximate one and certain to happen, if at all, within a definite period. But when the limitation is *destructible* by virtue of the power which the law confers upon the tenants in tail entitled under the settlement, it is immaterial to inquire whether the event on which the executory gift depends, regarded abstractedly from its situation with reference to other estates in the settlement, is certain to happen, if at all, within the definite period prescribed in ordinary cases. The essence of a Perpetuity is wanting, and, accordingly, a Perpetuity there is not in such a case.

Now, it is certainly quite possible (as in *Browne* v. *Stoughton* was the fact) that the estates-tail to which this destroying power is attached, may be contingent estates-tail, as being limited to persons not yet *in esse*. If limitations be made by a marriage-settlement to the intended husband for life, and after his decease to his first and other sons successively in tail, and then to his daughters as tenants in common in tail, with ulterior remainders-over, it is obvious that no one takes by virtue of these limitations who can at once or immediately disentail the settled land. That *power* will remain in suspense until the estates tail vest by the birth of tenants in tail, and the *exercise* of it will remain still further in suspense until such tenants in tail become legally competent to execute assurances of land by attaining twenty-one.

Then, does this circumstance of the estates-tail being limited to unborn children at all affect the general rule that limitations engrafted upon estates-tail are, on account of their destructibility, not to be deemed Perpetuities? Now, obviously, it must be always assumed that the estates-tail in question are *valid*,—that they are so limited as to vest within the prescribed

limits,—that, in fact, they do not themselves violate the Rule against Perpetuities. For, if in any case the limitations in tail are not well created, it necessarily follows, that they cannot render valid other limitations; the power to destroy the other estates must itself arise within the proper limits, in order that their destructibility may operate to remove objection to them as Perpetuities.

Now, is it not clear that estates-tail which will certainly vest within the limits of the rule, avail quite as much to preclude objection on the score of Perpetuity to the engrafted executory limitations, as estates-tail which vest at once upon the execution of the settlement? Is not this the established rule of our law? If we ask for authorities, there are *Tregonwell* v. *Sydenham* (*f*), *Morse* v. *Lord Ormond* (*g*), *Waring* v. *Coventry* (*h*), *Case* v. *Drosier* (*i*), and *Cole* v. *Sewell* (*j*), in each of which the limitations in tail were made to persons not *in esse*, but in each of which the destructibility of the ulterior gifts by the tenants in tail was admitted to be and recognized as the alone test to try whether those ulterior gifts were or were not Perpetuities. With Lord Chancellor Eldon (*k*), in the first of these cases, we may ask,—Can any one "contend that the mere circumstance of uncertainty who is to take after an estate-tail, where a recovery may be suffered, and all behind it goes, renders the limitation void?" And what can be more convincing than the undoubting reliance upon the same criterion, of a Chancellor, second only to Lord Eldon, in *Case* v. *Drosier*? It was not there a question with Lord Cottenham, whether, *if* within the disentailing power of tenants in tail not born at the creation of the gifts, the remote limitations could be held valid, but, taking this as an unquestioned and unquestionable postulate, he proceeded to inquire whether the gift in the particular case was in fact destructible by the owners of those estates-tail, and

(*f*) 3 Dow, 194.
(*g*) 5 Madd. 99; 1 Russ. 382.
(*h*) 1 M. & K. 249.
(*i*) 2 Keen, 764; 5 M. & C. 246.
(*j*) 4 Dr. & War. 1; 12 Jur. 927.
(*k*) 3 Dow, 202.

finding that, from the order and position of the limitations, they were *not* in that predicament, they were declared void as Perpetuities.

And we shall find the every day's practice of the Profession equally clear and decisive. A proviso is inserted in a settlement creating a multitude of limitations, that if any of the objects of those limitations shall refuse to take the name and use the arms of the settlor, the estate of such party shall determine, and the property go over to the next in remainder; and no limit is fixed to the duration of this shifting clause. How can this possibly have effect by our law, when it contemplates an event which may happen, not once only, but often, during a period indefinite, and to which no antecedent limit can be assigned? It does *not* have effect except in the single case where the limitations upon which it is engrafted, have created estates-tail; but when estates-tail are limited, they protect it, and that, whether limited to persons *in esse* or to children unborn (so only that the estates-tail themselves are valid). So, again, the shifting clause which is to defeat indefinitely the title of any and every object of the settlement who shall succeed to some other family property. So, the clause empowering tenants for life to limit jointures to their wives and portions to their children, but not to take effect until the indefinite failure of issue inheritable under prior estates-tail. But it is useless to multiply examples to establish the principle, that there is no distinction, in respect to the validity of gifts engrafted or expectant upon estates-tail, between cases where the estates-tail are forthwith vested, and those where, as being limited to unborn children, they are, in the first instance, contingent.

It may be admitted that, owing to a succession of minorities, the power to bar the entail may not be actually exerciseable for a considerable period. But clearly this does not affect the operation of the rule. If there be a trust or limitation to take effect on the indefinite event of failure of the issue of certain prior tenants in tail, the gift is not bad, because the

tenants in tail were not in existence when the settlement was made, or because, owing to a succession of minorities, &c., the estates-tail and subsequent limitation, may not be in a condition to be actually barred during a long period of time. On the contrary, the gift is sustained to precisely the same extent as a trust expectant on estates-tail limited to persons *in esse* and ascertained. And there is certainly no distinction, in this respect, between limitations expectant upon and provisions *collateral* to estates-tail, for just as the collateral limitation is sustained, though indefinite, when the tenants in tail are *in esse*, so is it not deprived of that protection by the circumstance of the estates-tail being limited to unborn children. *All* provisions in a settlement which may be destroyed by the tenants in tail entitled under it, stand upon the same footing, whether they *follow* and are limited as remainders or executory limitations *expectant* upon the estates-tail, or are *collateral* to and co-extensive with them, as limited by way of defeazance of the estates-tail.

The short summary of the doctrine then is this:—There being estates-tail, they must be constituted as the law allows, *i. e.*, they must vest within the prescribed period. Being such, there is a power inherent in the ownership of the estates-tail, to clear the property of all the restrictions of the settlement (not anterior to the estate-tail), and, by the hypothesis, that power will necessarily arise and subsist within the prescribed period. This being ascertained, the rule of law is satisfied. It takes no notice of the possibility of *minorities* or *disabilities* of any kind. For it is an invariable rule in the application of the doctrine of Perpetuities, to leave altogether out of consideration what arises merely from the actual course of events, as distinguished from what is involved in the nature and conditions of the gift. Therefore, the contingency that there may not be any owner of an estate-tail actually in a position to bar it, within the period limited by the rule, is not to be attended to in the inquiry, whether the given clause or limitation be valid or not.

Now, the clause of accumulation in *Browne* v. *Stoughton* was, in substance, an executory limitation: it operated in partial defeazance of the interests of persons entitled under preceding limitations. In the language of Lord Eldon, in *Marshall* v. *Holloway* (*k*), it was a dancing clause of accumulation; for it was a provision to take effect upon *every* succeeding occasion of the owner of the estate being under twenty-one. Obviously, therefore, the operation of the clause might continue indefinitely beyond the lives of parties in existence: no precise limit could be assigned to the duration of it. Consequently, in any case where the interests created by the will were not estates-tail, this clause would not have been valid within the doctrine of Perpetuities. But the limitations after the life estate in *Browne* v. *Stoughton*, were limitations of estates-tail, and those estates-tail were valid. Was not the clause of accumulation under these circumstances legal? The decision was, that it was not legal; and we must, therefore, search for the grounds upon which this conclusion rests.

It cannot be doubted that a recovery or disentailing assurance by any tenant in tail entitled under the will, would have destroyed the clause of accumulation. What, then, excluded the case from the general doctrine concerning limitations destructible by tenants in tail, established by the authorities which have been mentioned? It appears clear that no distinction can be taken upon account of the special nature and object of the clause in this case. Certainly, it operated to deprive the infant owner of the rents and profits of his estate during his minority; so far, at least, that he was to be entitled only to the income of the invested accumulations of the rents, instead of the rents themselves. But, it is quite competent to the author of the gifts, so to qualify the interests of the owners for the time being, provided only he do not transgress the boundary of Perpetuities (*l*). If it be a term of the settlement, no one is entitled to quarrel with it, except

(*k*) 2 Swanst. 432. (*l*) *Vide post*, p. 189.

upon the ground of illegality. But, how is it shewn to have been illegal, when it was destructible by tenants in tail entitled under valid limitations in the will? It is impossible to contend for any distinction between the validity of such a clause and the validity of other powers and provisions in a settlement creating estates-tail. Every one of those powers and provisions, although indefinite and unrestricted, is valid, so far as it is co-extensive with estates-tail created by the settlement. Clearly, the *objects* and *purposes* of these various provisions, are very different: but no distinction in principle arises upon the object or purpose of the particular clause; for all of them are either illegal, as being in substance Perpetuities, or legal as being destructible by the tenants in tail. Whether the clause be a power to sell, or exchange, or partition, or enfranchise, or to limit jointures or portions, or whether it be a shifting limitation to take effect upon refusal to use the name and arms of the testator, or upon the accession of another estate, the operation of the proviso in each and all of these cases is, to disturb and interrupt, or even wholly defeat the existing settlement of the *particular subject-matter* settled. In some of the instances, it may be true that the effect of the provision, is to transfer to other properties or funds the rights subsisting under the settlement, and not wholly to take away those rights: but this cannot be regarded in determining whether, as respects the particular property or fund originally settled, the clause in question is or is not too remote. Now, although indefinite and capable of arising at remote periods, every one of the clauses which have been mentioned, is legal in a settlement creating estates-tail as distinguished from estates in fee simple. But, if the argument be, that the clause in *Browne* v. *Stoughton*, separates the enjoyment of the land from the right to the land itself, and in that respect is to be distinguished from the other provisions alluded to, it may be asked whether this be a more violent and prejudicial restriction than that which *wholly deprives* the objects, of their interests in the settled property, when

they refuse to take the name and arms prescribed, or when they acquire the other family property specified. Again, are there not clauses in settlements of precisely the same tendency with the clause in *Browne* v. *Stoughton*, in the particular alluded to? A power to remote objects to limit large jointures to their wives,—may not this operate to deprive, in a great measure, subsequent owners of their enjoyment of the proceeds of the land? A power to trustees to lease for fines or premiums, they investing those fines and premiums,—wherein does this differ essentially from the clause directing rents to be invested during the minority of the owner for the time being?

Now, there are two cases which the decision in *Browne* v. *Stoughton* is said to have followed, and without overturning which, therefore, no objection, it is said, can be taken to that decision. The cases alluded to are *Lord Southampton* v. *Marquis of Hertford* (*m*), and *Marshall* v. *Holloway* (*n*), both of which are mentioned in the writer's former work (*o*). But have those cases any just application to settlements framed like the will in *Browne* v. *Stoughton?* In both those cases the trust of accumulation *preceded* all the other limitations of the settlement, and accordingly, it was not within the direct power of the tenants in tail to destroy it by their recovery (*p*). The trust in *Southampton* v. *Hertford*, was secured by a legal term, and that in *Marshall* v. *Holloway* was a trust annexed to the legal fee vested in trustees under the devise; but, in each case, the trust and the estate securing it were limited in priority to the estates of those who, by law, would have the power of suffering a recovery (*q*). This circumstance alone, it is submitted, very

(*m*) 2 V. & B. 54.
(*n*) 2 Swanst. 432.
(*o*) P. 594.
(*p*) *Eales* v. *Conn*, 4 Sim. 65.
(*q*) There is a valuable opinion of the late Mr. Sanders bearing upon this point, which the learned editors of his Treatise on Uses and Trusts (5th edn. p. 203, *n.*) have given to the Profession, and which the writer considers too important not to be here introduced. "With the utmost deference to the opinion of so great a Judge as Sir William Grant, I consider this case as an authority for sanctioning a refined distinc-

materially distinguishes the two older cases from that which is said to have followed them.

But there is a still more important and most essential distinction between the trust of accumulation in the late and those in the former cases. In *Browne* v. *Stoughton*, the accumulated fund was to be applied in the purchase of other estates, which when purchased were to be settled to the same uses, &c., as by the will containing the trust were declared of the estates devised. The clause, in fact, operated simply to bring into settlement additional property, and this supplemental settlement could not be invalid if the original one were valid, except upon the ground that the *events* upon which this additional settlement was provided to be made were indefinite and remote; but we have already seen that that objection is excluded by the fact that the provision was destructible. When we turn to *Southampton* v. *Hertford*, we find that in that case the surplus of the accumulated fund was given indefinitely to the first possessor of the estate who should attain twenty-one; and when the judgment of Sir William Grant is carefully read, it is manifest that this suspense in the vesting of the accumulated fund formed the ground of his decision, that the clause of accumulation was illegal. "This is an attempt wholly to sever the surplus rents

tion, instead of a decision establishing a principle and settling the law. It is not easy to discover the ground of the decision, but it is to be observed that the term of 1000 years preceded the limitations in tail; and it seems to be inferred, that a recovery by the tenant in tail, subject to the term, did not destroy the preceding trusts of the term. If this be the case, there is great fallacy in the inference; for the trusts of a term created for the purposes of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance, the trusts the term. A recovery by tenant in tail would acquire the fee simple, and render the term attendant on the inheritance discharged of the trust for accumulation." These observations do not refer to the circumstance that the destination of the accumulated fund in *Southampton* v. *Hertford* was too remote; which was an objection to the clause not answered by the fact of the destructibility of the clause of accumulation (supposing the argument of Mr. Sanders, that it was in substance destructible, to be sound).

and profits, from the legal ownership of the estate for a time, that may extend much beyond the period allowed for executory devises or trusts of accumulation, *and to give them to a person who may not come into existence until after that period.*" Again, —"as to the possibility that Lord Southampton may attain the age of twenty-one, that never has been held to be an answer to the objection that the trust, as originally created, is too remote. Supposing this accumulation allowed to go on, and he dies under twenty-one, *what is to become of the accumulated fund?* The deed says that it shall go to the *first person entitled to the estate, who shall attain twenty-one;* though there should be no such person for a century to come. *As it is impossible so to dispose of it,* I should then deprive Lord Southampton of the rents and profits during the years he had lived upon the speculation, that he *might live to take the accumulated fund.*" In *Marshall* v. *Holloway,* the accumulations were to be added to the testator's personal estate, the interests in which would be essentially different from the interests of the parties taking the realty. The Lord Chancellor decided this case almost wholly upon the strength of the preceding authority, *Southampton* v. *Hertford,* which, as he twice remarked, he could not distinguish from the case then before the Court. And he observed that the trust for accumulation he thought bad, "because it might last for ages."

Now, if the destination of the accumulated fund in *Browne* v. *Stoughton* was too remote, that circumstance, without doubt, would invalidate the whole clause; but if there was not invalid remoteness in the destination of the fund, then *Southampton* v. *Hertford* is not applicable as an authority; and both *Southampton* v. *Hertford* and *Marshall* v. *Holloway* are further inapplicable upon the distinct and independent ground that the trusts in those cases preceded the estates tail. The writer would have considered it a point too clear to require argument, that the interests in the accumulations in *Browne* v. *Stoughton* were *vested,* equally with the interests in the settled

property, but that the contrary has been urged upon grounds which, though little more than ingenious, must be noticed, in order to preclude the supposition that they are viewed as offering any substantial impediment to the doctrine here maintained.

It has been said that the circumstance of the fund being directed to be invested in the purchase of lands to be settled to the same uses as the devised lands, does not prevent the invalid suspension of the vesting of the fund, because the direction operates only upon the accumulations actually made, and has nothing to operate upon until an accumulating fund exists. But this argument appears to be novel and unsound. The interests are vested immediately the objects of the gifts are so ascertained as to be capable of taking whenever the preceding limitations may happen to fail, without the risk of any contingency to intercept their succession; and though it may be uncertain whether those interests will ever take effect in possession, this does not render otherwise than certain the interests to arise *in case* the course of events should bring into possession the limitations expressed. The interests in the accumulations do not depend for their vesting upon any other events than those which postpone the vesting of the estates in the land. The only distinction is, that there is indefiniteness in the events upon which the fund is to arise; but this is not a point which concerns the destination of the fund, and, as we have already seen, it is an objection completely removed by the fact of the provision being destructible.

It will now be fit to call attention to an important part of the decision in *Southampton* v. *Hertford*, which appears to exclude all argument to support *Browne* v. *Stoughton* upon the authority of that case. The trusts declared of the fund in *Southampton* v. *Hertford* were to apply it in discharge of the principal sums which at the time of the trust taking effect should incumber the estates, so that they might be completely freed and discharged from the same, and subject to the pay-

ment of these incumbrances the accumulation was to be made. And the Master of the Rolls held that the direction was not void, so far as it was a trust for the payment of the debts. Now, this shews conclusively thatt he ingredient in the provision which rendered it illegal in the opinion of the Court was not the remoteness of the events upon which it was to take effect, but the remote destination of the accumulated fund, as given to the first owner of the estate who should attain twenty-one, and no other. And further, is it not perfectly clear that a clause, which directs the rents during a minority, to be applied in relieving the settled estate from the gross charges upon it, is precisely the same in substance with a clause which directs those rents to be applied in adding other property to the subject-matter of the settlement? For what is a direction to discharge incumbrances upon the inheritance but an addition to the settled subjects of the value of the incumbered land?

Once more, a distinction has been attempted to be taken, that in clauses such as that in *Browne* v. *Stoughton*, there is a term inconsistent with its destructibility upon the vesting of the estate-tail, because the estate-tail cannot actually be aliened by reason of the minority of the tenant in tail, and yet that minority is the event and the period upon and during which the trust is to have effect. But it is clear there is nothing in this to shew that the clause is inconsistent with the notion of its being destructible immediately upon the vesting of the estate-tail. The clause is at once destructible, and the personal incapacity of the infant actually to destroy it will not be adverted to in determining whether, on account of its being destructible, it is valid. But, how can it be said, that the circumstance of the contingency referred to in the clause being the *minority* of a tenant in tail, at all differs it from other provisions in a settlement admitted to be valid because indestructible, which do not at all refer to the specific event of the tenant in tail's infancy? The usual name and arms clause engrafted upon limitations in tail is valid, although *not* restricted to the minority of

the tenants in tail, and yet it is said that the clause of accumulation is invalid *because* restricted to that period. This is to make shifting limitations the more sustainable the wider the range of operation contemplated in them. Clearly, the other clauses in question apply when the tenant in tail is an infant, and during his infancy, as well as subsequently; and it must be fallacious to argue that because the clause of accumulation refers, in terms, to the infancy of the tenant in tail, it is open to an objection on that account, which does not apply to the unrestricted shifting limitations.

It has further been argued, that although the trust may be said to follow the estate-tail as to all except the first tenant in tail, yet it is not true as spoken of the *first* tenant in tail, because it is to have effect prior to the period, when he will acquire the power to bar the entail. But the same argument must be reiterated, that this is an objection which, if it is of any value at all, applies to *every* species of clause or proviso in a settlement, creating estates-tail in unborn persons, and unless the alternative be accepted, that all such clauses and provisoes are void, just as though no estate-tail had been created, it is of no weight whatever to shew that the clause of accumulation in *Browne* v. *Stoughton*, was otherwise than legal and effectual. In fact, this argument, if consistently urged, would go to shew that remainders, executory limitations and powers, are not in any case protected from objection on the ground of Perpetuity, where the first in order of the estates-tail, or the first series of those estates, is limited to children unborn.

Considerable reliance has been placed in this discussion (*r*), upon the circumstance that the trust for accumulation during minorities ties up rents and profits which would otherwise be in a course of uninterrupted enjoyment and distribution as part of the personal estate of the tenant in tail though an infant. It is said that a disability is superadded, to make that inalienable, the enjoyment of which by law would not be

(*r*) 4 Hare, 375—381.

suspended for an hour. But, perhaps, it may be difficult to discover the weight of this consideration. Suppose the purpose of the trust or direction were to apply the fund, not by accumulation, but in satisfying principal sums payable to strangers, or in any other way not for the personal advantage of the tenant in tail. Consistently with the decree of Sir William Grant in *Southampton* v. *Hertford*, or with clear principles of law, it cannot be said that such a trust or direction, when destructible, would be void. But yet, in such a case, the infant tenant in tail loses profits which, in the absence of the trust, would undoubtedly have formed part of his personal property. Does not this ingredient render the trusts in essential points the same? But it may be replied, if the rents are to be *accumulated*, the parties make that *inalienable* which, by law, is alienable and susceptible of present enjoyment, notwithstanding infancy; whereas, to apply the fund at once, without accumulation, for present purposes, circulates or distributes, and does not tie up, the fund. The distinction is substantial, when the *destination* of the accumulation, as in *Southampton* v. *Hertford*, suspends the vesting of any interest in it for an indefinite period; but the distinction is submitted to be merely superficial, when, as in *Browne* v. *Stoughton*, the accumulation is not directed for an indefinite and remote purpose, or for the benefit of an indefinite and remote object, but is the subject of a trust which gives vested interests in the funds to those who take vested interests in the estate from the income of which it has arisen. Much has been said, on several occasions, about this feature in clauses of accumulation like that alluded to, but, upon examination, it seems to have arisen from an interpretation (apparently unfounded) of the language of Sir William Grant in *Southampton* v. *Hertford*. The terms which he used were for the purpose merely of shewing that the trust, in that case, created a Perpetuity in giving the *severed rents* of the estate to an *indefinite object* not necessarily to be ascertained within the prescribed limits.

Upon the whole, the writer submits that just as a remote limi-

tation or estate which is postponed to estates tail, is on that account exempt from the Rule against Perpetuities, so a trust or direction for accumulation of rents limited to arise upon uncertain events and of uncertain duration, is, when expectant upon or limited in partial defeazance of previous estates tail, legal and effectual, provided only the limitations of the fund to be produced by the accumulations (in other words, the destination of the fund) be not themselves open to objection, as involving a suspense in the vesting of the interests under those limitations for a period too remote. With regard to the Rule against Perpetuities, there is no distinction between accumulation of income and limitations of estates; and in those cases where a limitation of remote estates in the land would be legal, a direction for accumulating the rents of that land for a period indefinite, is conceived to be equally so.

It must be added, however, that if the view here taken be correct, it will necessarily follow that the restrictions of the Thellusson Act, 39 & 40 Geo. 3, c. 98, apply to the trusts of accumulation of which we have been speaking, so as to stop the accumulation at the expiration of the period of twenty-one years, for which the statute allows the accumulation to be continued.

The author desires to be understood as submitting his views upon this important subject with the most unfeigned diffidence, and with all the hesitation which becomes a writer who takes upon himself to differ in opinion from a judge so very likely to be right in his conclusion as the learned and respected Vice Chancellor of England. If there be any weight in the suggestions here offered, they are submitted as contributions to the inquiry concerning remote trusts of accumulation: if there be none, the writer will regret having raised upon insufficient grounds a question concerning the soundness of Sir L. Shadwell's decision.

There is a case of *Crosse* v. *Glennie* (*s*), which in some of its particulars much resembles *Lord Southampton* v. *Marquis*

(*s*) 2 Y. & C. (C. C.) 237.

of Hertford. In the case alluded to the testator limited a term of ninety-nine years in priority over all the other limitations of the will, which limitations were to certain persons *in esse* for their lives, and to the first and other sons of some of them successively in tail male; and the trusts of the term were declared to be for insuring and keeping in repair the messuages and buildings during the respective lives of the tenants for life, and during the minorities of the respective tenants in tail, and subject to these purposes for maintaining the infant tenants for life and in tail, and in case the whole of the surplus should not during the minority of any such tenant for life or in tail, be applied for his maintenance, then the surplus was to be invested, and the trustees were to stand possessed of the investments upon trust for such person or persons from time to time as for the time being should, under the limitations of the will, be entitled in possession to the devised estates, but, nevertheless, tenants in tail dying under twenty-one without issue inheritable to their estates-tail within the period of time in which executory devises were allowed, should not take the absolute interest, which should go to the next taker. It is obvious the only distinction of substance between this case and *Southampton* v. *Hertford* is, that in the latter case the destination of the accumulated fund was illegal, while in *Crosse* v. *Glennie*, the parties who took the estates were to have the fund arising from the accumulations. No contention was made that the trusts were either wholly or partially void, and therefore the Court, "without examining closely the value of the differences between this case and that of Lord Southampton," assumed the validity of the trusts. The only observation to be made upon this case, is, that so far as *Southampton* v. *Hertford* may have proceeded upon the ground that the trusts of accumulation *preceded* the estates-tail, *Crosse* v. *Glennie* was precisely in the same predicament with the previous case; but so far as *Southampton* v. *Hertford* rested upon the consideration that the *vesting of the accu-*

mulated fund was remotely suspended, *Crosse* v. *Glennie* was quite a different case.

Where the purpose of the accumulation directed is such, that the owner of the estate can put an end to the accumulation by satisfying that purpose, and he will acquire the power to do this during the time permitted by the law, the Court will hold the trust valid; because, without the consent of the owner of the estate, it cannot continue beyond the time during which the law permits a suspension of full power over the estate. Therefore, where the trust was for raising and accumulating a sinking fund for payment of mortgages (either existing at the testator's death, or made pursuant to his will), it was held not void for remoteness, although the period during which the accumulation might last was wholly indefinite. This was the case of *Bateman* v. *Hotchkin* (*t*).

The observations of the Master of the Rolls in this case support some of the arguments, urged in a previous page, with reference to the trust of accumulation in *Browne* v. *Stoughton*. The accumulation for paying off the mortgages was secured by a term of 2000 years, limited in precedence to the gifts for life, and in tail, made by the will, and the tenants in tail were (so far as appears) unborn children. Lord Langdale, M. R., said,—"The first tenant in tail attaining twenty-one years of age may acquire absolute dominion over the estate, subject to the mortgages. On that event taking place, the trustees of the term will become trustees for the owner of the estate, who may deal with the term and with the estate, at his own discretion, subject only to the mortgages. Without the consent of the owner of the estate, the trust for accumulation cannot continue beyond the time during which the law permits a suspension of full power over the estate. The period during which the attainment of full power over the estate is suspended, is permitted by law; and the accumulation, except at the will of the owner, can continue only during that lawful suspension."

(*t*) 10 Beav. 426.

Thus clearly did the learned Judge recognise the doctrine, that the rule of law takes notice of the capacity to bar the limitations which a tenant in tail possesses, and which will be fully enjoyed when he attains his age, although it may be true that, by his death under age, and the succession of another minority, the power may in event not be exercised for a long period of time. It is the "period during which the suspension in the attainment of full power over the estate is permitted by law," and the incapacity being personal merely, the law regards the power as existing, though its exercise is suspended. Or, in the words of Vice Chancellor Wigram (*u*), "the law which admits of a strict settlement, admits that the *corpus* of the estate may be inalienable for centuries, by reason of disabilities which the law imposes."

It may be observed, that the doctrine of *Bateman* v. *Hotchkin* is the precise converse of the doctrine which Lord Brougham relied upon in *Keppell* v. *Bailey* (*v*); for in that case his Lordship considered that the ingredient, which precluded objection to a restraint by covenant or condition was, not that the owner of the property subject to the covenant or condition was enabled to set himself free from it, but that the party entitled to the benefit of that covenant or condition might, at his pleasure, extinguish or release it. Certainly, there is considerable opposition in these views; but, as the writer has already had occasion, in a previous page, to shew (*w*), the doctrine which, as he ventures to think, is most agreeable to the principles of our law, is that of *Bateman* v. *Hotchkin*, as opposed to the theory of *Keppell* v. *Bailey*.

(*u*) 4 Hare, 374. (*v*) 2 M. & K. 527.
(*w*) *Vide supra*, p. 19.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES, AS IT AFFECTS THE LIMITATION AND EXERCISE OF POWERS OF SALE, EXCHANGE, PARTITION, LEASING, AND THE LIKE (*a*).

THE question concerning the validity of indefinite and unrestricted powers (*b*) in settlements not creating estates-tail (*c*), which has so long been the subject of doubt, still remains in the same unsatisfactory state. The point arose in *Nelson* v. *Callow* (*d*); but, as in other cases upon this subject, it happened there was not any argument. The devise was to trustees in trust for the first son of the testator's brother, P. R., who should attain twenty-one (or die under that age, leaving issue living at his decease), *his heirs and assigns*, and on the failure of the preceding trusts, the trustees were to hold the estates in trust for the person or persons who should then be the testator's heir or co-heirs, absolutely. And the will empowered *the trustees* thereof *for the time being*, at any time after the testator's decease, in their sole discretion, to sell the estates, and lay out the proceeds in the purchase of other estates, to be settled upon the same trusts, and subject to the same powers as were declared of the devised estates. The trustees contracted to sell part of the devised property, and an objection was taken by the purchaser, that the power was void, as contravening the Rule against Perpetuities. But the counsel on both sides being of opinion, that the objection

(*a*) The position of this chapter has been changed, because many of the observations upon *Browne* v. *Stoughton* (pp. 174—189) apply to *Ferrand* v. *Wilson* mentioned, *post*, p. 197.

(*b*) Treat. Perp. 541.

(*c*) Treat. Perp. 562.

(*d*) 15 Sim. 353.

could not be sustained, and the Vice Chancellor of England being of the same opinion, a specific performance of the agreement was decreed. It is conceived that this conclusion was quite consistent with the authorities. It was a power given to *trustees*, and to be exercised during the *continuance of the trusts* reposed in them, which trusts were themselves valid, and would not remain open longer than the period permitted by the rule. The power was in fact *limited*, and was, therefore, good; and, in this respect, *Nelson* v. *Callow* is an authority precisely in point with *Wood* v. *White*, mentioned in the former work (*e*).

The general doctrine that, in order to render valid an indefinite power, it should be a power collateral merely to *estates-tail* (*f*), appears plainly to be recognized by Sir Edward Sugden, in *Cole* v. *Sewell* (*g*). In the course of his judgment in that case, the Lord Chancellor said—"The question has often been discussed in recent times, how far the general powers of sale and exchange, which are usual in settlements, are good, and their validity has been doubted. I cannot say that I entertain any doubt upon the point. I think that they are perfectly good, although not in terms confined within the Rule against Perpetuities, and upon this principle, that such powers may be barred by the owner of the preceding estate-tail; and if once an estate in fee has been acquired by any one claiming under the limitations of the instrument, by which the power was created, it naturally ceases."

It has been suggested (*h*), that powers of sale and exchange, leasing, and other like powers, are to be distinguished in the present inquiry as not tending to Perpetuities, but as relaxing merely the restraint which a common settlement imposes, and being mere words of management of estates. It does not appear that these observations were meant to imply

(*e*) Treat. Perp. 550—552.
(*f*) Treat. Perp. 553, 562.
(*g*) 4 Dr. & War. 32.
(*h*) 4 Hare, 381.

the validity of the powers in question, when unrestricted and not qualified by consent being required, and when not engrafted upon estates-tail. If such a doctrine was intended to be conveyed, it conflicts with the opinion of Sir Edward Sugden, intimated in the passage above quoted.

The question, whether an unrestricted power may be good for a limited time, and bad for the excess only (*h*), was much discussed in the important case of *Ferrand* v. *Wilson* (*i*). The learned Judge in that case, drew a distinction between a power, which aims at accomplishing a single act, at a period possibly too remote, and a power to be carried out by successive acts, to be done from time to time, the earliest of which may be good, and the more remote only void. There is considerable weight in this distinction, for, as was well observed, the *intention* in powers of the latter description can partially be effected by modelling or apportioning the power, since each of the successive acts, as far as it goes, is an exact fulfilment of the testator's intention, both as to the thing to be done, and the party to be benefited. But, the writer does not consider it *settled* finally, that an unrestricted power, whether for sale, or cutting timber, or accumulation, can be apportioned. The point seems to depend upon whether the Courts are at liberty to select a specific period, within which the exercise of the power may be good. There is certainly great difficulty in doing so, but very possibly it would not be objectionable to take the limits suggested by the learned Judge, in *Ferrand* v. *Wilson*, namely, a life estate limited by the instrument creating the power to a person *in esse*. But then, if a life estate, why not also twenty-one years beyond it? Or why not twenty-one years absolute from the creation of the estates, supposing the life should expire within that time. It is here that the difficulty exists, because the selection of the limits, whatever they be, must obviously to some extent be arbitrary.

(*h*) Treat. Perp. 553, 559. (*i*) 4 Hare, 376—381.

It remains to speak more particularly of the actual decision in *Ferrand* v. *Wilson*. By the will, an estate for life was limited to E. F., with remainders in tail to his first and other sons, with other remainders for life and in tail, all of which were valid; and a power was given to the testator's executors, at any time, until some person entitled in possession to an estate tail, or some greater estate, in the devised property should attain twenty-one, to cut timber for sale, and the proceeds of the sale were to be applied in payment of debts and legacies, and subject thereto in the purchase, from time to time, of lands to be settled to the same uses as the devised estates, with an interim trust for investment in government or real securities, the dividends arising therefrom to be received by the persons who would be entitled to the rents of the estates to be purchased.

The Court held the trusts declared concerning the proceeds of the timber, under the power given to the executors, to be void for remoteness. The arguments at the Bar were most elaborate and able, and the learned Vice Chancellor went at considerable length into the principles and authorities upon the question of unrestricted powers. The Court held that, consistently with *Ware* v. *Polhill*, the power could not be modelled, because it was a power tending to a Perpetuity, and in this respect, as the Court considered, it differed from powers of sale, exchange, and leasing which had been distinguished from cases like that before the Court. This point has been already observed upon. The Court further held that as the right of an infant tenant in tail to cut timber was restrained by the power in the trustees, the trust in effect made inalienable for ages what by law was alienable notwithstanding infancy. Upon this ground, that the power might, prevent an infant tenant in tail from cutting timber by his guardian, and so withdrew the timber from present enjoyment, the Court further held that the timber trust could not be sustained to the full extent to which it went. And the Court considered the result of this to be, that it must fail altogether.

It is precisely at this point in the reasoning of the Court that the suggestion arises whether in truth the power was not capable of being sustained.

The doctrine of the Court in this case may be found to have very materially affected the validity of all powers not restricted to the limits of Perpetuity, although engrafted upon limitations of estates-tail. Those powers are in ordinary cases held good, not because they may be apportioned, but because they are destructible, and accordingly they may be exercised (unless destroyed) at *any* period of time. Now, suppose that the power to cut timber had not at all referred to the attainment of twenty-one by a tenant in tail in possession. We must, of course, conclude that the decision of the Court would have been to the same effect, namely, that the power was void; for it cannot be imagined that the insertion of that limit to the duration of the power was deemed to make it illegal when without the specification of any limit it would be good. Clearly the power was destructible by the children of the tenants for life, who would be tenants in tail; and clearly also, as a general principle, the fact of the tenants in tail being at the time unborn, or being infants, would make no difference whatever, their estates being well limited. Now, the power being in this manner destructible was yet held void ;and as the other powers in strict settlements are valid on account only of this very element of destructibility, it is a most important question whether there was anything in the nature of the power in *Ferrand* v. *Wilson*, to distinguish it in any material respect from other powers in strict settlements. It was a power to apply the proceeds of timber (whether the timber be a profit or part of the inheritance is immaterial) in the purchase of other property to be added to the settlement made by the will; and there was not even the circumstance, which occurred in *Browne* v. *Stoughton*, of an interim accumulation. In observing upon that case, the writer has already endeavoured to shew the difficulty of coming to the conclusion, that there is anything essentially distinguishing the power in the mere cir-

cumstance that it deprives infant tenants in tail of what would otherwise be part of their estate. It is by this simple point that the future must determine whether *Ferrand* v. *Wilson* be or be not a conclusive authority. If there be anything essential in the distinction in question, then it may be admitted that the case is not within the ordinary doctrine concerning powers destructible by tenants in tail. But if (as the writer humbly ventures to think) there be nothing essentially material to distinguish the power in question from other powers, then one of two conclusions must necessarily follow:—either the ordinary indefinite powers destructible by tenants in tail unborn, are not on that account valid, but can be sustained only by being modelled or apportioned; or else the decision in *Ferrand* v. *Wilson*, in not carrying out the old doctrine concerning powers which a tenant in tail may destroy, will not be sustained. That doctrine, it may be hoped and believed, is too sure to be now overturned.

One general observation may be made with reference to the possibility of a dangerous use being made of the doctrines of law upon which the remarks concerning *Browne* v. *Stoughton* and *Ferrand* v. *Wilson* have been grounded. If in any case it should, in the opinion of the Court, be clear that a particular proviso, or a particular power, has been inserted in the settlement, with a direct view of creating a Perpetuity, under cover of limitations in tail which in form and appearance make it destructible, there can be no doubt the general principles of our law would require the Court to declare the power and proviso void as an evasion of the Rule against Perpetuities. In a Court of Equity, at least, this would not be a novel or strange proceeding, for contracts are often held void there, as in spirit trenching upon some rule of public policy, although not precisely within the letter of the rule, so as to be illegal in the estimation of a Court of law. But it may be expected that when this ground is taken with reference to provisions in spirit constituting Perpetuities, it will be plainly and explicitly avowed by the Courts, and rested upon its own merits. Neither

in *Browne* v. *Stoughton*, nor in *Ferrand* v. *Wilson* was this ground taken; but in each the Court held the provision to fall within the limits of the law against Perpetuities. The writer does not mean to intimate that, supposing the decisions had been otherwise, the clauses in those cases might be considered invalid as obnoxious to the spirit of the rule, for in truth there seems but little ground to contend that they were avowed and designed Perpetuities. On the contrary, they may be said to have formed fair and reasonable arrangements for the perfection of the settlements, and the adjustment of the interests of those entitled under them.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES, AS IT AFFECTS THE GRANT AND RESERVATION OF RENTS, CONDITIONS, RIGHTS OF ENTRY, INTERESSE TERMINI, EASEMENTS, AND OTHER COMMON LAW INTERESTS.

THE subject mentioned in the former work (*a*), of a contract binding a purchaser or grantee of land not to build upon it, or not to make use of it in some particular manner, was discussed in *Ex parte Ralph* (*b*). In this case it was proposed to insert in the conveyance to the purchaser a limitation of a rent charge to the vendors in fee, issuing out of the land, with powers of distress and entry, but subject to a proviso that, in each year in which the purchaser's covenants should have been performed, the rent should be held by the vendors in trust to be attendant on the land charged with it. The vendors proposed to secure their right to have the covenants specifically performed, by a limitation of a long term of years. But, a clause was afterwards agreed upon, by which a power of entry was given to the vendors, in case the purchaser, his heirs or assigns should during the life of any party to the deed, or within twenty-one years from the death of the survivor of the parties, fail to perform and keep the covenants contained in the deed as to building upon the land. This case, then, recognises the validity of the covenants, as did *Keppell* v. *Bailey* (*c*) before it; and also recognises the doctrine stated in the former work (*d*), that the estate or power in the land by which performance of the covenant is to be secured, must be restricted in conformity with the Rule against Perpetuities.

(*a*) Treat. Perp. 612.

(*b*) 1 De Gex, (Ca. in Bank.) 219.

(*c*) 2 M. & K. 517.

(*d*) Treat. Perp. 613; Appendix, 4.

A perpetual severance of the right to timber from the right to the estates on which it may be growing, would clearly be void for remoteness, unless an interest or estate were given in fee-simple in the land itself, either as a surface grant, or as an incorporeal hereditament in the shape of a license to disturb the soil for the purpose of taking the trees. Such a license (*e*) or such a grant would, it is conceived, be valid. But where there is merely a direction for the perpetual appropriation of the timber to purposes, or for individuals, different from those concerned in the ownership of the land, then, clearly, the disposition of the timber would be void as a Perpetuity. The point arose in *Silvester* v. *Bradley* (*f*), but in that case the Court was able to come to the conclusion that the trust respecting the timber on the estates was of a limited duration, and did not transgress the boundaries of Perpetuity.

(*e*) *Haigh* v. *Jagger*, 16 M. & W. 540. (*f*) 13 Sim. 75.

SUPPLEMENT TO THE CHAPTER ON THE RULE AGAINST PERPETUITIES AS IT AFFECTS LIMITATIONS OF PERSONAL CHATTELS TO GO OR DESCEND AS HEIR-LOOMS WITH REAL ESTATE ENTAILED IN STRICT SETTLEMENT.

In *Rowland* v. *Morgan* (*a*), there was a bequest by H., Earl of A., to his son J., and his heirs, Earls of A., of various personal chattels, to be held as heir looms, and by a codicil, certain others were to be taken and considered to be heir-looms in the testator's family, and the executors were authorized to make an inventory. Estates had been settled by Act of Parliament inalienably, which had become vested in the testator for an estate in tail male. The testator's son J. succeeded to the title and estates, but died unmarried, and the question was whether the chattels formed part of his personal estate; a claim being made to them by the Earl who inherited the dignity and estates upon the death of Earl J. The Court considered the question to be, whether the will and codicil contained an express testamentary gift, or whether it was directory merely, and came to the conclusion that the will contained a simple and direct *gift*, and that accordingly the executors of Earl J. were entitled to the chattels given by the will, although the intention of the testator would be thereby disappointed, as he meant the chattels to be inalienable, as far as they could be made so.

The immediate ground of the decision was, that the words of the bequest were well adapted to create an estate of inheritance, notwithstanding the qualification required that the heirs

(*a*) 6 Hare, 463; 13 Jur. 23.

should be Earls of A. The case, consequently, did not strictly belong to the class where there is a gift of chattels to be used as heir-looms, and to be enjoyed by the person entitled to the real estate. Indeed, it was expressly observed, both by Sir James Wigram, V. C., and the Lord Chancellor, that the heir-looms were not annexed to the limitations of the real-estate, the only heirship referred to being that of the Earldom of A. But, it should be observed that the principle was distinctly affirmed by both the learned Judges, that where the bequest is to be treated as direct, and not as executory, the chattels vest in the first person entitled to an estate of inheritance in the land, and is not to be protected further by the interposition of a Court of Equity (*b*). *Trafford* v. *Trafford* and *Gower* v. *Grosvenor*, noticed in the former work (*c*), were both treated by the Court as overruled by other decisions, so far as they applied to *direct gifts*. The question mentioned in the previous work (*d*), whether if the clause of the will were directory merely, the Court would be at liberty to give effect to the intention by carrying on the limitations of the chattels, as far as the rules of law would allow, according to the course pursued in *Gower* v. *Grosvenor* and *Trafford* v. *Trafford*, was expressly left undecided in this case; although Sir James Wigram, V. C., seemed inclined (*e*) to hold that, even upon the supposition of the clause being executory, the executors of Earl J., the first taker, would have been entitled.

Although it is true that where a trust is directory and executory, the Court may be at liberty to effectuate the design to render the property inalienable, to a reasonable and lawful extent, yet the intention must limit the interposition of the Court, for, in the words of Lord Cottenham, in *Ibbetson* v. *Ibbetson* (*f*), the Court is not to do for a testator *all that can be done by law*, but no more than what he has *intended to be*

(*b*) Treat. Perp. 643.
(*c*) Treat. Perp. 652.
(*d*) Treat. Perp. 645.
(*e*) 6 Hare, 470.
(*f*) 5 M. & C. 28.

done, and according to the common acceptation of *the terms*. Upon this principle chattels will sometimes *not* vest absolutely in the first tenant in tail, according to the ordinary rule upon that subject. Thus, if the express gift be to a tenant in tail in possession of twenty-one years of age, the Court will consider this sufficient to negative any intention of benefiting any one who should not answer the whole of the description. And, although the effect of this direction of the testator may be, to render the disposition *illegal*, yet the Court will not consider that as affording a reason for introducing into the will a gift of an estate, which the testator not only has not directed, but has shown himself anxious to avoid.

SUPPLEMENT TO THE CHAPTER ON LIMITATIONS EXEMPT FROM THE OPERATION OF THE RULE AGAINST PERPETUITIES.

CONCERNING limitations in mortmain and to charitable uses which, although rendering the property practically inalienable, are allowed by the law, when made and perfected agreeably to the regulations prescribed for such dispositions (*a*), the doctrine of the case of *Martin* v. *Margham* (*b*) is important. That decision shews that, although a Perpetuity may virtually be created by a charitable trust or foundation, yet the internal structure and constitution of the trust must be conformable to the same Rule against Perpetuities which governs other dispositions. In other words, the enjoyment of the property by the charity must not be less free and unfettered than the enjoyment of property by individuals under private trusts: *e. g.* an indefinite trust for accumulation for the benefit of a charity, is void so far as it operates to restrict the present use of the funds for the purposes of the charity; but where the testator shews an intention to devote the property to charitable purposes, the trust for the charity will not, on account of the invalid direction to accumulate, altogether fail. Of course, there is nothing in the doctrine which has been now stated to preclude those necessary details and arrangements for erecting, carrying on, and perpetuating the charitable foundation, which are implied in the very fact of a charity being constituted.

An interesting and somewhat novel point was decided in the late case of *Fordyce* v. *Bridges* (*c*). The question was there raised, whether the bequest of a fund to be invested in a

(*a*) Treat. Perp. 687—708. (*b*) 14 Sim. 230.
(*c*) 10 Beav. 90; 2 Phill. 497.

regular Scotch entail, which, as shewn in the previous work (*d*), may be limited so as to create a Perpetuity which in England would be illegal, is void here as itself a Perpetuity. It was held by the present Lord Chancellor (Lord Langdale, M. R., having entertained doubts upon the question) that "the fund being to be administered in a foreign country is payable here, though the purposes to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country." His Lordship considered the case analogous to the rule in cases of bequests within the Statute of Mortmain, where a charity legacy void in this country under the Statute of Mortmain, is good and payable here, if for a charity in Scotland. It was accordingly held that the objection raised upon the ground of Perpetuity, could not be maintained. The evils (*e*) of perpetual entails in Scotland have been remedied in a considerable degree by the 11 & 12 Vict. c. 36.

(*d*) Treat. Perp. 717. (*e*) Treat. Perp. 718, 722.

THE END.

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